

1 IN THE UNITED STATES DISTRICT COURT.
2 FOR THE DISTRICT OF NEW JERSEY
3 CIVIL 02-2917 (JEI)

4 PATRICK BRADY, SALLY YOUNG,
5 HOWARD HOLLANDER, THEODORE CASE,
6 AND MICHAEL FINUCAN, individually
7 and on behalf of all others
8 similarly situated,
9 Plaintiffs,

10 V.

VOLUME 17
TRIAL TRANSCRIPT

11 AIR LINE PILOTS ASSOCIATION,
12 Defendant.

CAMDEN, NEW JERSEY
JULY 7, 2011

13 B E F O R E: HONORABLE JOSEPH E. IRENAS
14 UNITED STATES DISTRICT JUDGE

15 A P P E A R A N C E S:

16 TRUJILLO, RODRIGUEZ & RICHARD
17 BY: NICOLE M. ACCHIONE, ESQ.
18 AND: LISA J. RODRIGUEZ, ESQ.
19 AND
20 GREEN JACOBSON, P.C.
21 BY: ALLEN PRESS, ESQ. (MO. BAR)
22 AND: JOE D. JACOBSON, ESQ. (MO. BAR)
23 For the Plaintiffs.

24 ARCHER GREINER
25 BY: STEVEN FRAM, ESQ.
AND
KATZ & RANZMAN
BY: DANIEL M. KATZ, ESQ.
FOR THE DEFENDANT AIR LINE PILOTS ASSOCIATION.

ELIZABETH GINSBURG, ESQ.
IN-HOUSE COUNSEL FOR ALPA.

1 Pursuant to Section 753 Title 28 United States
2 Code, the following transcript is certified to be an
3 accurate record as taken stenographically in the
4 above-entitled proceedings.

5 S/ LYNNE JOHNSON

6 Lynne Johnson, CSR, CM, CRR
7 Official Court Reporter
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17 LYNNE JOHNSON, CSR, CM, CRR
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1 THE COURT: Good morning, everybody.

2 MR. FRAM: Good morning, your Honor.

3 THE COURT: Mr. Fram.

4 MR. FRAM: Your Honor, thank you.

5 You heard mention yesterday I believe of Mike Abram
6 who is a partner at the Cohen, Weiss firm yesterday.

7 THE COURT: Until this morning I haven't, the name
8 hadn't stuck in my head. But I now know that he is a partner
9 at that law firm and he is here in court, through apparently
10 for the defense for ALPA.

11 MR. FRAM: Yes, your Honor.

12 Mr. Abram was handed a subpoena this morning by
13 plaintiffs counsel. We assume they are making an effort to
14 introduction into evidence P-264. As your Honor may recall,
15 P-264, a premarked exhibit, part of the joint final pretrial,
16 an internal memo at the Cohen, Weiss firm that is analyzing
17 some legal issues and throwing out some hypotheticals that
18 relate to the 45 million dollars fine that Judge Kendall in
19 Texas had imposed.

20 THE COURT: Let's be specific. The memo was a
21 research memo done by an associate, I believe, at the Cohen,
22 Weiss firm.

23 MR. FRAM: Yes, your Honor.

24 THE COURT: It was addressed to four or five
25 people, not addressed to the witness who was on the stand at

1 the time.

2 MR. FRAM: Not address to Mr. Seltzer.

3 THE COURT: Let me finish. The point that the memo
4 sailed /*R said that one of the ways to avoid, in effect
5 said, it didn't say quite like this, but one of the ways to
6 avoid potential liability on ALPA's part of the huge fine
7 that had been levied against APA, based on the sick-out it
8 had earlier, was instead of merging the two unions, was to
9 conduct a traditional card campaign, and then have an
10 election and then presumably the American pilots would vote
11 to join ALPA, and they would join ALPA, but leaving behind
12 any liability that APA had.

13 That was the thrust of the memo, and plaintiffs
14 want it in because, at least a couple of witnesses have made
15 a big point that ALPA doesn't like to conduct card campaigns
16 against other unions. In other words, incorporated pilots
17 who were already represented by another union, who are to
18 take from an unorganized, unrepresented group. That is why
19 they want it in.

20 MR. FRAM: Your Honor, I don't think the memo says
21 that. Quite says that. It sets out a number of
22 hypotheticals in terms of --

23 THE COURT: Yeah, but it does, I mean, if somebody
24 had followed that advice, it does say use a card campaign
25 rather than merge the unions. I think it does say that.

1 MR. FRAM: I am not sure I agree with that, your
2 Honor.

3 THE COURT: It doesn't make any difference. They
4 think it says that and they want it in.

5 MR. FRAM: Okay. That apparently is what they want
6 to argue based upon the memo. We have course dispute it.

7 THE COURT: Right.

8 MR. FRAM: My point, if I may, it is a premarked
9 exhibit. If they wanted it in, it was their obligation to
10 put it in as part of their case in chief. They tried to get
11 it in through Duane Woerth, if you recall. He hadn't seen
12 it. They tried to raise it with David Holtzman as well,
13 again on cross examination, couldn't do it, and they tried
14 with Mr. Seltzer again.

15 And the problem we have, your Honor, of course, is
16 that this is part of their case in chief. This is not
17 rebuttal. This is not an issue that came up as part of our
18 case that we raised affirmatively. It is an issue that --

19 THE COURT: You did raise -- not that I want to get
20 into that, but you did raise affirmatively, very strongly, by
21 several of the witnesses, that you don't use card campaigns
22 when somebody you are trying to organize is already
23 represented by a union. An it is a matter of policy of ALPA
24 not to be --

25 MR. FRAM: That actually came out in the

1 plaintiff's case, your Honor. They showed the videotape
2 testimony of Hunnibell and Clark who recited they were told
3 that.

4 THE COURT: Duane Woerth said that.

5 MR. FRAM: He did.

6 THE COURT: That was your case, too. Well, all
7 right.

8 MR. FRAM: My point, your Honor, is this is not
9 proper rebuttal. This is something that they have been
10 trying to prove since day one. They could have tried to take
11 Mr. Abram's deposition and put him on the witness list. He
12 wasn't there. Indeed, when we talked about the wrap-up of
13 the case, they represented their sole rebuttal witness would
14 be Sherry Cooper.

15 THE COURT: I am more concerned with, instead of
16 whether it is proper rebuttal or not, whether it is
17 admissible or not, whether rebuttal or otherwise.

18 MR. FRAM: We don't think it is.

19 THE COURT: Why don't you argue that.

20 MR. FRAM: Even if it could be authenticated it is
21 just a thought piece to have an associate coming up with
22 hypotheticals. The testimony we have, I think in the record
23 already, is Mr. Woerth never saw it. No one is talking about
24 these issues. He never saw the evidence. Even if you
25 authenticate it and, to get it in evidence it is an internal

1 memo of the Cohen, Weiss firm that is a thought piece.
2 There is no evidence it was ever communicated to anybody at
3 ALPA.

4 THE COURT: I can't remember if it was Duane
5 Woerth. At least one of the witnesses testified that, it
6 wasn't illegal to run a card campaign for a union that was
7 represented. It was just a matter of policy of ALPA not to
8 do that. I know one of the witnesses -- I think I asked the
9 question.

10 MR. FRAM: Seth Rosen, your Honor.

11 THE COURT: What?

12 MR. FRAM: That was Seth Rosen.

13 THE COURT: I think I was the one who asked that
14 question, is there anything, per se, illegal about running a
15 card campaign, when you are trying to organize a group that
16 is already organized and I think the answer was clearly no, it
17 was not illegal. It was just sort of a matter, we don't raid
18 other unions, it is a matter of policy.

19 MR. FRAM: The other reason why we are concerned
20 about the lack of a connection, and the confusion and
21 prejudice here is, if you recall, the APA fine, the testimony
22 we have, the APA fine gets resolved in April and May of 2001
23 and then the card campaign is not initiated by Clark and
24 Hunnibell until late May.

25 So to the extent there is any relevance or argument

1 to be based upon this, we are just going to be going around
2 in circles. This advice, if ever given, became irrelevant as
3 soon as the APA fine got resolved in late April, early May of
4 2001.

5 But the more important point I think again is I
6 think as your Honor appreciates, lawyers think of
7 hypotheticals, and create issues and research them
8 internally. And they don't necessarily --

9 THE COURT: And bill for it, too.

10 MR. FRAM: And bill for it. Thank goodness for
11 that. But they don't necessarily communicate advice, there
12 is no indication here that any particular advice was given
13 and the connection the plaintiffs want to make that this was
14 part of the conspiracy. This doesn't fly. And the facts
15 don't support it. So.

16 THE COURT: Well, this was dated before the
17 announcement of the acquisition.

18 MR. FRAM: November 6, 2000. So there is no --

19 THE COURT: The acquisition wasn't announced until
20 January.

21 MR. FRAM: Exactly. So you can't argue, your
22 Honor, this was created at a point in time that it was
23 improper, that this is part of a backdoor way to include the
24 American pilots. It was entirely proper. It was entirely
25 proper for Duane Woerth to talk to the APA.

1 If you recall, he testified about the speech he
2 gave to the APA where they asked him about the \$45 million
3 fine. He said we have our lawyers looking at that to see if
4 we can resolve that.

5 There is nothing improper about this. We are
6 concerned about plaintiffs arguing about a memo that was
7 written at a time when there was no impropriety somehow can
8 be used to argue later. So under 403, under 401, we really
9 object to this going in, and for the rebuttal issues I
10 mentioned before, we object to Mr. Abram being called and
11 request that the Court quash the subpoena.

12 MR. KATZ: May I add one point to that, your Honor?
13 If you look at the memo itself it is by an associate in the
14 firm, as you noted, your Honor. And it attributes comments
15 to Robert Savelson, RSS, conversations that associates
16 thought he had with someone at ALPA. However, that is double
17 and triple hearsay with regard to whether those statements
18 were ever made at all. So it is unreliable in the extreme.
19 Because of that --

20 THE COURT: Double hearsay. If it was in the
21 report, it would be hearsay, if he took the stand.

22 MR. KATZ: If he were to say it from the stand.
23 But it is triple hearsay because it is a memo.

24 THE COURT: All right. I get the point.

25 Mr. Jacobson.

1 MR. JACOBSON: First I would like to correct what
2 was stated about Mr. Woerth's testimony. Mr. Woerth did not
3 tell the APA board on that first meeting.

4 THE COURT: What board?

5 MR. JACOBSON:. He did not tell the APA board the
6 first time he met he had lawyers researching 45 million
7 dollars question to see if it would be a problem. The
8 testimony was he had lawyers research it and it was not a
9 problem. They wanted them now. So.

10 THE COURT: When was this? This is a speech he
11 gave in November.

12 MR. JACOBSON: Yes.

13 THE COURT: When he went to the APA board in
14 November.

15 MR. JACOBSON: Correct. He didn't say we are
16 researching the issue. He said I had it researched and it
17 is not a problem. Your Honor, we believe that this is the
18 research to which he is referring.

19 The fact that RSS says he met with John Cohen and
20 Marcus Migliori and briefly Duane Woerth isn't, while there
21 is no statement here specifically attributed to them, that is
22 the context of the opinion saying here are issues to be
23 resolved.

24 So it is not being offered for the truth that they
25 said gee, what do we do --

1 THE COURT: What is it being offered for? Let's
2 start with that. What disputed fact in this case?

3 MR. JACOBSON: This is rebuttal to defendant's --

4 THE COURT: Forget the word rebuttal.

5 MR. JACOBSON: -- defendant's claim they never do a
6 card campaign at a work site that has already been organized
7 or is represented by the a union. This explains reasons why
8 one would do so and the purpose being to avoid an existing
9 liability of 45 million dollars and to avoid a potential
10 liability in consumer class actions be brought against the
11 union that you would like to merge with. And lays out, if
12 you do these things, your chances of avoiding these liability
13 ever the successor are improved.

14 And if, it gives a lie to their defense that we
15 don't do card campaigns at places that are unionized. And it
16 is true rebuttal.

17 THE COURT: There is nothing in there that says
18 that ALPA is going to conduct a card campaign. This is a
19 lawyer who comes up with, which may well be an accurate
20 theory, I am not, you know, that you might be able to avoid
21 successor liability that would flow from a merger by
22 conducting a campaign directed to the individual pilots, a
23 card campaign.

24 MR. JACOBSON: You are correct --

25 THE COURT: That is different from saying that

1 ALPA, as a matter of policy, was ready to conduct that kind
2 of card campaign. There is no indication that they ever
3 adopted that theory, that it was communicated to them. You
4 say Woerth says our lawyers tell us it is no problem, if you
5 are trying to tie it to that, well, I don't know that that
6 advice, how do I know that that advice, what witness will say
7 that advice was given to ALPA, or somebody in authority at
8 ALPA.

9 MR. JACOBSON: Your Honor, we have subpoenaed Mr.
10 Abrams and he is the lawyer who has a close relationship to
11 ALPA. He was one of the recipients of this memo. He may be
12 able to tell us that. We don't know that. We haven't
13 deposed him. We don't know his testimony. This memo doesn't
14 say ALPA will do this. But it does lay out a road map, how
15 one could do a campaign at APA in light of --

16 THE COURT: Nobody ever denied -- nobody ever
17 asserted from ALPA that as a matter of law you couldn't
18 conduct a card campaign if a union, if another union was
19 already representing the group you were targeting.

20 MR. JACOBSON: No, your Honor. What they said is we
21 don't --

22 THE COURT: As a matter a policy. They said it is
23 a matter of policy that we will not raid, the word raid was
24 used, we will not raid another union.

25 MR. JACOBSON: As Mr. Seth Rosen said in his

1 testimony on cross examination, well, these policies are
2 things that are guidelines, they are suggestions, we are not
3 bound by them. But we can do other things and this
4 suggestion, this document suggests that the activity that we
5 have shown all this evidence in our direct case about the
6 card campaign and the connections between the card campaign
7 and ALPA wasn't simply a bunch of American pilots off on
8 their own without any encouragement or support by ALPA, but
9 in fact --

10 THE COURT: That is a contested issue that we have
11 to deal with.

12 MR. JACOBSON: Right. And this supports the
13 conclusion that in fact ALPA had from their general counsel
14 who they have been dealing with, representing them since the
15 thirties --

16 THE COURT: Is he here?

17 MR. FRAM: Yes.

18 THE COURT: I am going to hold a 104 hearing, right
19 now. Mr. Abram, where are you? That good looking guy
20 sitting. I wondered who he was. Swear him in.

21 THE COURT: Can I have that document? I am sure I
22 have it here.

23 M I C H A E L A B R A M, Sworn.

24 THE COURT: Did you receive this document which is
25 P-264 for identification.

1 A. Yes.

2 THE COURT: You received a copy of it.

3 THE WITNESS: Yes, I did.

4 THE COURT: Did you have any conversations with
5 anybody at ALPA, either ALPA, and I include in that anybody
6 at the MEC, you know, any pilot, did you have any
7 conversations with anybody at TWA or ALPA about this memo.

8 THE WITNESS: TWA MEC or ALPA.

9 THE COURT: Or ALPA, yes, right.

10 THE WITNESS: I don't recall, your Honor, any
11 conversation was anyone outside of the firm. I haven't
12 checked anything on it for sure but I don't recall any.

13 THE COURT: So sitting here now you don't recall
14 conveying anything about this subject matter, forget the
15 memo, the subject matter of the memo, did you have any
16 discussions with anybody at ALPA or anybody at the TWA MEC
17 about conducting a card campaign.

18 THE WITNESS: No, your Honor.

19 THE COURT: Did you have any discussions with
20 anybody at ALPA or TWA MEC about the problem of trying to
21 organize the APA pilots in light of the outstanding 45
22 million dollars contempt fine.

23 A. I don't recall any. I haven't reviewed anything to make
24 sure but I don't recall any conversation.

25 THE COURT: Okay. Where would you go from there?

1 MR. JACOBSON: Your Honor, would you ask him
2 whether --

3 THE COURT: You can ask him.

4 BY MR. JACOBSON:

5 Q. Had you had any conversation was any of the other
6 lawyers in your firm about advise they may have given ALPA in
7 connection with any desire to organize the American Airline
8 pilots?

9 A. I had discussions with at least one other lawyer in the
10 firm about the subject matter of this memorandum.

11 Q. Who was that, sir?

12 A. Mr. Savelson. That would be one of the person.

13 THE COURT: Is that RSS?

14 A. Robert Savelson, he is the RSS, your Honor. I don't see
15 his name as a recipient of this memo, but I do know I
16 discussed this subject matter with him.

17 THE COURT: Who is Mr. Savelson.

18 A. He is one of my partners in the firm.

19 BY MR. JACOBSON:

20 Q. Is he the individual whose initials appear in the first
21 paragraph, RSS met with John Cohen?

22 A. Yes.

23 Q. Was Mr. Savelson someone who had regular contact with
24 ALPA officers on these topics, or just contact with ALPA
25 officers?

1 A. He is one of the lawyers in the firm who had regular
2 contact with ALPA officials at MEC's, and in the national
3 office on a lot of different things.

4 THE COURT: What would you be your next question?

5 MR. JACOBSON: I wasn't prepared to do this
6 yesterday and I don't have my question yet.

7 THE COURT: Okay. You can step down.

8 THE WITNESS: Thank you.

9 (Witness excused).

10 THE COURT: Make your last argument. I don't want
11 to keep the jury.

12 MR. FRAM: The only reference in here to a card
13 campaign, we have five numbered questions. If you look at
14 page 4, your Honor, the memo does not talk about ALPA running
15 a card campaign. What it says in the fifth numbered
16 paragraph --

17 THE COURT: What page are you on?

18 MR. FRAM: Page 4, your Honor. Paragraph number 5.
19 What if the APA BOD, APA key committee members, et cetera,
20 offered to distribute and collect ALPA cards. So we are not
21 talking about ALPA running a card campaign. I just want the
22 record to reflect that. The other thing --

23 THE COURT: Go back. What were you just saying.

24 MR. FRAM: Your Honor, I am trying to highlight the
25 fact that the memo doesn't talk about ALPA running the card

1 campaign. The memo talks about, what if the APA BOD.

2 THE COURT: It would be difficult to stand in the
3 way of getting assistance if ALPA wants to run a quick and
4 successful representation campaign.

5 MR. FRAM: It says ALPA has to start off by
6 collecting close to 70,000 cards.

7 MS. RODRIGUEZ: 7,000.

8 MR. FRAM: Sorry. 7,000, 70 percent, which I think
9 is consistent with the idea that you need a lot of cards,
10 from Mr. Rosen's testimony.

11 THE COURT: He says it is hard to do.

12 MR. FRAM: Any way, I rest on my prior arguments,
13 your Honor. Thank you.

14 MR. JACOBSON: With respect to the last point that
15 was made, if you see that paragraph five that he pointed to
16 is the fifth of five called dilemma questions that begin on
17 page 3. And it says, you know, if we are trying to do a card
18 campaign, what is the result, what is the effect of APA
19 participating, how does that jeopardize us on successorship.

20 THE COURT: All I know is what I get out of all of
21 this, we get out of Mr. Abram brief appearance at the 104
22 hearing, is that in November of 2000, ALPA was certainly
23 interested in absorbing, if you will, if that is the right
24 word, the American pilots into ALPA.

25 One of the problems they were worried about was

1 this very large contempt judgment against APA in favor of
2 America, and they were afraid that if somehow or other they
3 took over representation of the American pilots, that they
4 might find themselves stuck for 45 million, is that the
5 number?

6 MR. FRAM: Yes, your Honor.

7 THE COURT: For a 45 million dollars judgment.

8 An associate in the firm, Cohen, Weiss, was asked
9 to research the question. He researches it, he gives both
10 legal and practical, in a way, practical, makes legal and
11 practical observations. There is no question he considers
12 the possibility that you can avoid, possibly, possibly avoid
13 the liability by not merging with APA but rather by
14 conducting -- by having, I don't want to say who, but by
15 having somebody conduct a card campaign and collecting enough
16 cards to trigger an election and then the election, if things
17 work out the way ALPA wanted, would be in favor of having
18 ALPA representation. But there is no indication that this
19 was, I mean, what evidence that this was what was conveyed to
20 ALPA or even that ALPA accept accepted this advice and
21 decided to act upon it?

22 I think, if nothing else, from a 403 perspective it
23 is very confusing to the jury, it raises all kinds of issues
24 that really have nothing to do with this case. It doesn't
25 put the lie to Duane Woerth's testimony that it was their

1 policy to not conduct card campaigns for unions, for groups
2 of pilots already represented by an independent union, or a
3 different union.

4 I am going to quash the subpoena to Mr. Abram. And
5 let's get the jury out here and proceed with the defendant's
6 case.

7 MR. FRAM: Thank you, your Honor.

8 (The jury enters the courtroom.)

9 THE COURT: Good morning, everybody. I assure you,
10 while I am late getting you out, we have been working since
11 quarter after.

12 So sometimes matters take a little longer than we
13 expect.

14 Okay. Mr. Fram.

15 MR. FRAM: Your Honor, thank you. At this time we
16 would like to play the videotape testimony of Randy Babbitt,
17 taken on August 28, 2008.

18 THE COURT: I am sorry. You can I have the date
19 get.

20 MR. FRAM: August 28, 2008, your Honor.

21 THE COURT: August eight?

22 MR. FRAM: August 28.

23 THE COURT: 28. August 28.

24 MR. FRAM: 2008. I think we have heard mention of
25 Mr. Babbitt's name a few times.

1 THE COURT: This testimony is under oath and it has
2 the same force and effect as if it were given in the Court.

3 MR. PRESS: The jury will hear my voice. Can you
4 explain the context of the deposition.

5 THE COURT: Depositions are part of a process we
6 call discovery. And it gives either party the right to
7 examine potential witnesses who have been identified as
8 people who might have knowledge of the case. And so some of
9 the questioning you will hear was done by Mr. Press. That
10 doesn't mean that it is his witness or he is deposing the
11 witness, it just means in the context of discovery, at that
12 moment he was doing the questioning.

13 There is going to be some questioning by the other
14 side.

15 MR. PRESS: No.

16 THE COURT: It is all by you. Okay. But that just
17 means he was exercising his right to take discovery of the
18 witness negotiations with the American pilots the whole
19 process, the idea of a federal trial is not to have ambush
20 and surprise. That is Perry Mason. The idea is that each
21 side gets to know what the other sides case is, so there is
22 no ambush, no surprise. As I said, Mr. Press was exercising
23 his right to do that.

24 But under certain circumstances, portions of the
25 discovery deposition may be played in court as evidence. And

1 you are to treat it as if Mr. Babbitt is here in court under
2 oath testifying. Even though you are hearing it as part of
3 the discovery deposition. It is no different to evaluate it,
4 you are to evaluate the same way, it gets no more weight or
5 less weight just because it is presented this way. Okay.

6 Is that satisfactory?

7 MR. PRESS: Thank you, Judge. Yes.

8 MR. FRAM: Thank you, your Honor.

9 (Videotape deposition of Randy Babbitt commences).

10 THE COURT: Hold on. I can't believe the jury is
11 following this.

12 MR. PRESS: It started on page 18. When what I was
13 handed by defendant's counsel starts on page 4. There is a
14 lot missing.

15 MR. FRAM: Your Honor, I thought we worked this out
16 yesterday.

17 THE COURT: That is what I was advised.

18 MR. FRAM: Can I confer with Mr. Press for a
19 moment, please?

20 JUROR: Can we turn it up, too?

21 THE COURT: Part of it I didn't hear either.

22 MR. PRESS: I never got this, this is part --

23 THE COURT: Whoa. Whoa. Even though the jury just
24 got comfortable. I am going to send them back out. I don't
25 want them to see this. Please keep an open mind. Do not

1 discuss the case among yourselves until, very soon. See you,
2 it could be three minutes, four minutes. I don't know.

3 (The jury leaves the courtroom.)

4 THE COURT: Mr. Fram, what I heard so far was
5 garbled. I had trouble following what was going on and I am
6 sure the jury did.

7 MR. FRAM: I don't disagree, your Honor. I am
8 trying to figure out what happened. We emailed to Mr. Press
9 late yesterday the final, final of this. Apparently we
10 didn't connect in the way we thought we did. If I could take
11 a moment with him I am sure we can work this out.

12 MR. PRESS: Your transmission was never received.
13 I never got this.

14 (Off-the-record discussion)

15 MR. FRAM: I apologize, your Honor. I think we are
16 ready.

17 THE COURT: Okay. Try again. If at first you
18 don't succeed.

19 (Jury enters the courtroom.)

20 THE COURT: Okay. The lawyers report that they
21 have worked out the glitches in the playback of Mr. Babbitt's
22 testimony. So.

23 MR. FRAM: Yes. We a we apologize for the
24 confusion, your Honor. We are ready to proceed.

25 THE COURT: Okay.

1 (Videotape of Randy Babbitt is played).

2 MR. FRAM: Your Honor, I asked to pause. I
3 thought this might be a good time for a break.

4 THE COURT: Okay.

5 MR. FRAM: Is that okay?

6 THE COURT: Do not discuss the case amongst
7 yourselves. Keep an open mind until you have heard all the
8 evidence. All rise. We will come back at quarter to 11.

9 (Jury leaves the courtroom)

10 THE COURT: Mr Fram, can you do a favor for me? I
11 was never presented with a list of what was going to be
12 played. I want to put on the record what was played from the
13 August 28, 2008 deposition. And it will take a few minutes.
14 Can you read off those pages, lines and pages.

15 MR. FRAM: Yes.

16 THE COURT: So we will all know what to use as part
17 of the record.

18 MR. FRAM: Would you like me to read that now?

19 THE COURT: Now.

20 MR. FRAM: Sure. I would ask Mr. Press to spot me,
21 to make sure I get it right.

22 THE COURT: Mr. Press, this is a heavy burden on
23 you.

24 MR. PRESS: I am up to the task.

25 THE COURT: I am sure you are.

1 MR. FRAM: Page 4, line 2 to page 16, line 6.

2 Page 18, line 22, to page 19, line 4.

3 THE COURT: 18, line 4.

4 MR. FRAM: 19, 4. Page 19, line 10, to page 20,
5 line 17.

6 Page 20, line 21, to page 21, line 7.

7 Page 21, line 24, to page 23, line 15.

8 Page 31, line 6, to page 32, line 19.

9 Page 41, line 5, to page 42, line 16.

10 Page 42, line 17, to page 43, line 20.

11 Page 44, line 17, to page 57, line 11.

12 Page 57, line 12, to page 74, line 15.

13 Page 75, line 21 to page 78, line 22.

14 Page 79, line 14 to page 82, line 5.

15 Page 82, line 15 to page 88, line 11.

16 Page 89, line 7, to page 91, 17.

17 That is where we have broken, your Honor.

18 THE COURT: Okay. See you in 15 minutes.

19 (Recess)

20 (Jury enters the courtroom.)

21 THE COURT: Mr. Fram, you may proceed with Mr.
22 Babbitt.

23 MR. FRAM: Thank you, your Honor.

24 (Videotape of Randy Babbitt continues).

25 MR. FRAM: That concludes the testimony of Mr.

1 Babbitt, your Honor.

2 THE COURT: What is next?

3 MR. FRAM: We have exhibits that go along with it
4 that we would like to introduce.

5 THE COURT: Did you give me the two minutes, to
6 give me page and line.

7 MR. FRAM: We did 91, 17. We picked up with page
8 91, line 18 to page 92, line 10. Page 95, line 5 to 95, line
9 20.

10 Page 95, line 21, to page 96, 15.

11 THE COURT: Slow down a bit. Go ahead.

12 MR. FRAM: Page 96, 16 through 101, line 9.

13 THE COURT: 101 what?

14 MR. FRAM: Line 9, your Honor. Testimony page 103,
15 8, to 104, 22.

16 Page 116, line 1, to page 1 17, line 2.

17 Page 117, line 3, to page 119, line 21.

18 Page 119, 3, to line 8. Page 119, 22, to --

19 THE COURT: 119, 22?

20 MR. FRAM: 119, 22, to page 120, line 19.

21 Page 123, line 9, to page 124, line 7.

22 Page 128, line 5, to page 129, line 15.

23 Page 132, line 13, to page 133, line 17.

24 Page 133, line 22, to page 135, line 5.

25 Page 137, line 16, to page 140, line 16.

1 Page 141, line 4, to page 141, line 23.

2 Page 142, line 14, to 142, line 15. Page 143, line
3 13, to page 146, line 10.

4 Page 147, line 20, to 148, line 3.

5 Page 160, line 1, to page 162, line 8.

6 Page 162, line 9, to page 163, line 3.

7 Page 163, line 4, to page 166, line 4.

8 THE COURT: Okay.

9 Now let's go to the exhibits.

10 MR. FRAM: I will identify them for the record.

11 THE COURT: Right.

12 MR. FRAM: P-151.

13 THE COURT: P.

14 MR. FRAM: P-151, which is the Eclat consulting
15 letter agreement as of February 1, 2001.

16 J 152, a fax from Mr. Babbitt to Mr. Wilder dated
17 January 16, 2001. P-153 is another fax from Mr. Babbitt to
18 Mr. Wilder dated February 26, 2001.

19 P-154 is a March 5, 2001 letter from Mr. Babbitt to
20 captain Robert Stow.

21 P-155 is another letter from Mr. Babbitt to Mr.
22 Stow dated March 31, 2001.

23 With his statement.

24 P-156 is a statement of Eclat, dated May 9, 2001.

25 P-158 is a fax from Mr. Babbitt to Mr. Wilder dated

1 February 28, 2001.

2 J 160 is a fax from Mr. Babbitt to clay Warner
3 dated March 27, 2001.

4 J 163 is a fax from Mr. Babbitt to Captain Stow,
5 dated April 24, 2001. And finally, P-164 is an email, the
6 top message is an email from Mr. Babbitt to Keith O'Leary,
7 Robert Stow, Robert pastor, dated April 24, 2001, your Honor.

8 THE COURT: That attaches resolutions.

9 MR. FRAM: It did. This copy of the exhibit itself
10 does not have the attachment. I assume it is not intended to
11 be part of the exhibit.

12 THE COURT: On your list of exhibits does have it
13 as part of the exhibit.

14 MR. FRAM: Let me confer.

15 THE COURT: The in the description in the exhibit
16 list in the, says email from Babbitt to O'Leary, attaching
17 draft resolution --

18 MR. FRAM: Pardon me for a moment, your Honor..

19 (Off-the-record discussion).

20 MR. FRAM: Your Honor, neither counsel seems to
21 have the attachment.

22 THE COURT: You will find it somewhere.

23 MR. FRAM: We will do that, your Honor.

24 THE COURT: Are you offering all these into
25 evidence?

1 MR. FRAM: Yes, your Honor.

2 THE COURT: Any objection?

3 MR. PRESS: No.

4 THE COURT: Okay. Then P-151, J 152, P-153, P-1
5 54, P-155, P-156, P-158, J 160, J 163, P-164 will be in
6 evidence.

7 MR. FRAM: Your Honor, we have two other exhibits
8 to offer that have been stipulated to by counsel.

9 THE COURT: Which are?

10 MR. FRAM: D 137.

11 THE COURT: D 137.

12 MR. FRAM: And D 136.

13 THE COURT: 136. Any objection, Mr. Press?

14 MR. PRESS: No, your Honor.

15 THE COURT: They are in evidence.

16 What do you have planned next?

17 MR. FRAM: With that, ALPA now rests its case.

18 THE COURT: Ladies and gentlemen, let's take a
19 brief break.

20 I want to discuss with counsel where we are going.
21 I believe, I believe rebuttal you have just one witness?

22 MR. PRESS: That is true.

23 THE COURT: That witness would have been here today
24 but had a funeral so won't be here until Monday.

25 MR. PRESS: Yes.

1 THE COURT: That witness we anticipate will take a
2 couple of hours, if that.

3 MR. PRESS: Yes.

4 THE COURT: That is done, and that is the end of
5 your case.

6 MR. PRESS: Yes.

7 THE COURT: In rebuttal.

8 MR. PRESS: Yes.

9 THE COURT: Then we go to closing arguments. And
10 my charge.

11 So you will have the case, I can't tell you whether
12 it is Tuesday or, Tuesday morning, Tuesday afternoon. But
13 what we have left is again one witness that was going to be
14 here today, and she is in Florida.

15 MS. RODRIGUEZ: In Florida.

16 THE COURT: She was going to be here today, but a
17 sudden death occurred and the funeral is today.

18 So we show sympathy and kindness and we will have
19 her Monday morning.

20 Then I say, I am repeating myself we are going to
21 have the closing arguments that each counsel gets to argue,
22 in a good sense of argue, to argue why you should view the
23 case in their light. Then I will read the instructions to
24 the law which are very, I would say 45 or 50 minutes. And by
25 the way, you will have a copy of that with you in the jury

1 room. You don't have to memorize it. You should pay
2 attention.

3 And then the case is yours.

4 So since the witness we were going to have is no
5 longer here, we would have filled up the rest of today. I am
6 going to send you home and see you Monday morning. To wrap
7 up the case.

8 So have a safe trip home, safe trip in, have a nice
9 weekend. And also, not only will we wrap up this case next
10 week, my birthday is next week. So we will have two reasons
11 to celebrate.

12 JUROR NO. 12: My birthday is next week, too. Make
13 it three.

14 THE COURT: What, what?

15 What day?

16 JUROR NO. 12: The 12th.

17 THE COURT: I am the 13th. My college roommate is
18 the 12th. I am July 13th. My sister is August 13th. The
19 thirteenth was a popular day for my mother.

20 Well, okay. Have a great weekend. Do not discuss
21 the case among yourselves. Keep an open mind. Do not
22 discuss the case with friends or loved ones. It is only now
23 a couple of days and the case will be in your hands. Keep an
24 open mind until you have heard everything.

25 (The jury leaves the courtroom.)

1 THE COURT: All right. We had a 2:30 time for
2 arguing the motion. You want to push that up a little bit?

3 MR. FRAM: We have one open evidentiary issue we
4 had deferred. That was our request to strike from evidence
5 parts of P 148, the documents after April 18, 2001. If you
6 recall.

7 THE COURT: Yeah, you were going to get together
8 and tell what it is you wanted in and what he objected to.

9 MR. FRAM: We did. We put a tab in the notebook.
10 We are objecting to everything that has a date after April
11 18.

12 THE COURT: That was ten documents.

13 MR. FRAM: Yes.

14 THE COURT: You want to do that now.

15 MR. FRAM: If it is convenient for the Court.

16 THE COURT: All right. Let me take five minutes.
17 I want, I got to make some entries on the list of exhibits.
18 Go and have a comfort break and let me fill in what I have to
19 fill in on my charts. Okay.

20 MR. FRAM: Yes, your Honor.

21 (Recess)

22 THE COURT: All right, everybody.

23 We are dealing with now exhibit 148, which is a,
24 which at some point without objection I might add was
25 introduced in evidence in bulk. However, the defendant has

1 now raised a question as to whether documents dated after
2 April 18, 2002, should be admissible because as of that time
3 ALPA no longer represented the TWA pilots, therefore, it
4 certainly owed them no duty of fair representation and indeed
5 there would be nothing untoward about this them seeking to
6 carry out their unity policy, to go after independent unions,
7 go after the pilots in independent June's, to have them join
8 ALPA.

9 I don't take an absolute rule that just because
10 something is after April 18 it couldn't be relevant. But I
11 look at most of this stuff and most of it would be highly
12 confusing to the jury. Quite candidly there is a whole big
13 exchange about a letter Woerth wrote or an email he sent in
14 June, something like that, all kinds of things back and
15 forth. So the first one I haven't objected, I have that
16 isn't objected to is P 148, PPPPP, ALPA Bates number 039188.

17 THE COURT: Are you there?

18 MR. FRAM: Yes.

19 THE COURT: Mr. Press.

20 MR. PRESS: Yes.

21 First of all, the first email here dated, is dated
22 April 23 and it is sent by Terry M, who is Terry M?

23 MR. PRESS: Terry McCullough, American pilot.

24 THE COURT: To Ron Rindfleisch. It says, is this
25 email authenticity. Then he attaches the email which I guess

1 has to do with money spent by ALPA earlier in the campaign
2 top organize the APA pilots. I am not sure I understand it.
3 But there is no particular response to the question, that I
4 can see.

5 First it says, after the letter is purportedly
6 signed by Duane Woerth. P S. On a personal note could you
7 send me an updated seniority list. We had hoped to implement
8 this if you had been in charge of the TWA APA buyout. And S
9 S, if the list had gone the way you wished, what the its
10 status seniority, would your brother have gotten versus what
11 he actually -- I don't know what that means.

12 MR. PRESS: Your Honor, I can short circuit this.

13 THE COURT: I can't figure this out.

14 MR. PRESS: We have no problem removing this from
15 the exhibit.

16 THE COURT: Let's start with that. 148 P P P P P is
17 not in evidence. I am not going to personally take it out
18 148 5 P's.

19 MR. FRAM: Your Honor, could I make one comment in
20 terms of the, your Honor knows it went into evidence without
21 objection. We did raise this cut-off --

22 THE COURT: The general cut-off point you did
23 raise, you raised it several times. I am going to hear your
24 argument.

25 MR. FRAM: I appreciate that.

1 THE COURT: If something shouldn't go in evidence,
2 the fact that it went in evidence even without objection at
3 the time. The way this went in, talking about one or two
4 documents in a book of hundreds of documents, clearly, maybe
5 I should be more vigilant.

6 MR. FRAM: I am not suggesting that at all, your
7 Honor.

8 THE COURT: What?

9 MR. FRAM: I am not suggesting that at all.

10 THE COURT: The answer is I am going to hear you.

11 MR. FRAM: Thank you, we appreciate that.

12 THE COURT: Now, the next document which is QQQ, is
13 actually dated 2/11/'02.

14 MR. PRESS: The first page is dated April 30, '02,
15 Judge.

16 THE COURT: Well, you are right. The handwritten
17 note is dated April 30. But it is attached to a receipt, or
18 a xerox of a receipt for Mailboxes, Inc. And if I am not
19 mistaken, the position of plaintiff is that mailbox was being
20 used by Clark as part, in connection with his card campaign.

21 MR. PRESS: That was his testimony.

22 THE COURT: Right. People could send their cards
23 to that box. And this is a, I guess it is a submission, a
24 reimbursement for the cost.

25 MR. PRESS: Ron. Add this to the reimbursement

1 request, please.

2 THE COURT: Attached to it which I think is still
3 part of QQQ is the renewal, a notice about the renewal of the
4 box, starting on March 4. Right?

5 MR. PRESS: Correct.

6 MR. FRAM: Your Honor, I can --

7 THE COURT: And then attached to that still part of
8 the same exhibit is again another renewal notice.

9 MR. FRAM: Your Honor, I can simplify this. We
10 believe that that document with the April date on it is a
11 duplicate of the same document with a February date that is
12 earlier in the notebook, five E's, I am told. We don't
13 really care if --

14 THE COURT: Well, I was not going to take these out
15 because although you are right they are dated afterwards,
16 they are continuations of a set of facts that occurred prior
17 to April. The box clearly was in existence for many, many
18 months prior to April. So as to Q, I am not taking it out.
19 I am not removing it from evidence.

20 MR. JACOBSON: Your Honor, for the record could
21 reflect it is five Q's.

22 THE COURT: Everything I say is five. The PI
23 removed is five P's. 5 Q's, I am not taking out. The next
24 document is P 148 5 R's.

25 MR. PRESS: I have no problem removing that.

1 THE COURT: Okay. Let me make a note. 148 5 R's
2 is not in evidence. Okay.

3 The next one is a memo to Seth Rosen from Ron
4 Rindfleisch, with copies to Ken Cooper, Bill Roberts, York,
5 Cradle Bill Sharp,, dated June 5, 2002.

6 Reorganizing update --

7 Who is Cooper, Roberts, York and Cradel?

8 MR. PRESS: Mr. Cooper and Mr. York I believe were
9 in Mr. Rosen's department. Mr. Katz would be better --

10 THE COURT: They are all employees of the union.

11 MR. PRESS: Yes.

12 THE COURT: Roberts and Cradel.

13 MR. PRESS: All four of those men are ALPA
14 employees, Judge.

15 THE COURT: Okay. And it says that American, pilot
16 contact advised passed resolution at each domicile to form
17 committee to merge with ALPA. Please advise what actions are
18 necessary. That is a two-page document. That is SSSSS.
19 What is your position on that?

20 MR. PRESS: This is a continuation of what we saw
21 in April, where one of these resolutions gets passed, Miami
22 first, and if you recall mid March and on April 3rd a
23 resolution gets passed in Dallas. And this memo says that
24 that is going on all over the country. So this is just a
25 continuation of the story, Judge. This goes to --

1 THE COURT: We are now three months later, though.
2 This is June. April, May, June. Two and a half months
3 later.

4 MR. PRESS: Remember Mr. Rosen told us how all
5 this work that has to be done to accomplish these goals.
6 This is it. And Judge, I think this goes directly to ALPA's
7 real motivation and their conflict of interest while they
8 were representing the TWA pilots. That is what it is offered
9 for.

10 THE COURT: Let me tell you where I am hung up
11 their is no doubt that ALPA, in November of 2000, passed a
12 unity resolution. But basically embarked on a plan or a
13 goal, in other words, a goal, uniting or reuniting, as the
14 case may be, with independent pilot groups. Nobody denied
15 that. I think that is clear from the record.

16 January, American announces the acquisition of TWA.
17 Certainly fairly soon seniority became a big interest. The
18 contract permitted for waiver of scope, and from some of the
19 things Babbitt said, although that wasn't his field, by March
20 he was talking about that. It became clear fairly on, it
21 became clear that would be a big issue. Certainly ALPA
22 should have cut-off, you know, negotiating with American.
23 They should have not participated in any way in any
24 organizing campaign. If they did not would be an issue of
25 fact for the jury.

1 But come April 18, when they are declared a single
2 carrier, LLC and American, a single carrier, APA now
3 represents the former TWA pilots and the subject of the
4 collective bargaining agreement, including Supplement CC of
5 the APA collective bargaining agreement, and ALPA says I want
6 to bring them back in the fold. I want to do what I have to
7 do to get American -- what is wrong with that?

8 MR. PRESS: This is part of the story. They were
9 conflicted going in and they were conflicted coming out and
10 what do they do? They went right back to their real agenda
11 the whole time.

12 The timing of this is not coincidental, Judge.
13 April 3rd is when, that is the day that ALPA lost its
14 bargaining rights. On that day these resolutions get
15 forwarded up to ALPA. And then the ball really gets rolling
16 as we see in June, in the memo you are looking at.

17 THE COURT: I think the April 3rd resolution is in.
18 They are already in.

19 MR. PRESS: They are absolutely in.

20 THE COURT: They are in, and I understand that.
21 But now we are getting further a field concerning activity
22 that is perfectly legal.

23 MR. PRESS: We are not questioning its legality.
24 We are offering this and we think it is evidence of ALPA's
25 conflict of interest, Judge.

1 MR. JACOBSON: May I add something?

2 THE COURT: Yes.

3 MR. JACOBSON: Mr. Rosen in his testimony on the
4 stand on direct testimony testified to the huge amount of
5 work, the huge amount of time, the huge amount of money
6 required over many, many months to get to the point where you
7 start getting resolutions for unity. So the fact that we
8 have resolutions here in June are suggestive that there was
9 before this many months of work with many volunteers and much
10 money spent.

11 And so it is like an ocean liner rather than a race
12 car. You didn't just start and stop on a dime. It takes
13 time to get this thing underway.

14 THE COURT: You shove it in reverse in Jamaica and
15 you pull to a stop in the Bahamas.

16 MR. JACOBSON: Something like that, your Honor.

17 MR. FRAM: Couple points if I can.

18 THE COURT: I am not sure Mr. Jacobson is finished.

19 MR. JACOBSON: Given that this is just two months
20 roughly after the end of the representation and given Mr.
21 Rosen's testimony about the many months required to get to
22 this point, and the work and the money required to get to
23 this point it is reasonable for a jury to say, okay, in June
24 they have got resolutions coming up in all of these
25 domiciles, that reflects many months of preparation including

1 preparation at the time when ALPA was still the exclusive
2 bargaining agent for the TWA pilots. I think that is a
3 reasonable inference.

4 MR. FRAM: A couple things.

5 THE COURT: Yes.

6 MR. FRAM: I think Mr. Press mentioned on April 3 a
7 resolution was passed. That wasn't the case.

8 THE COURT: Well, as I recall, there was a little
9 bit of ambiguity as to whether it was passed. The evidence
10 was it was introduced. It wasn't clear it was even seconded.
11 I am not sure.

12 MR. FRAM: Exactly.

13 THE COURT: But it was discussed at that, at the
14 Dallas Fort Worth.

15 MR. FRAM: Yes.

16 THE COURT: It was discussed but the record was
17 unclear as to whether it had actually been seconded or
18 passed.

19 MR. FRAM: Yes, your Honor.

20 THE COURT: One of the pilots who was introduced
21 had to leave to go fly some.

22 MR. PRESS: I don't mean to make a misstatement
23 there.

24 THE COURT: I am sure you didn't.

25 MR. FRAM: I wasn't suggest he was. In terms of

1 the document you have in front of you much you it is
2 reporting American pilots were trying to pass resolutions. I
3 think what is important here is two things --

4 THE COURT: No, no. I think what may be more
5 important than the fact that a bunch of pilots are trying to
6 pass resolutions, American pilots, is that Rindfleisch and
7 Rosen were involved with them. I think that is more to the
8 point. It is just a question of, you know, that is more the
9 issue.

10 MR. FRAM: Your Honor, I don't believe the
11 documents suggest that they were involved with encouraging or
12 and obviously they have no direct control over what American
13 pilots do and of course now that the TWA pilots, the former
14 TWA pilots are part of American, for all we know they are the
15 ones out there saying we want to continue being members of
16 ALPA the fact that we are past.

17 THE COURT: Please advise what actions are
18 necessary. In talking about actions of ALPA, not action of
19 APA.

20 MR. FRAM: That's correct, your Honor. As you
21 pointed out once a single carrier determination is finalized
22 on April 5, certainly after April 18 when the best efforts
23 arbitration is over there is no legal prohibition on ALPA
24 doing this. Our concern in terms of confusion is
25 considerable.

1 And if any of this does come in, your Honor, we
2 would have to request the Court specifically instruct the
3 jury that ALPA was fully permitted after April 5 to go out
4 and try to organize American. And I don't think we need to
5 get into that. I don't think there is a reason to put in
6 irrelevant evidence and then have to tell the jury that it is
7 relevant and that it is irrelevant and don't be confused by
8 it. We believe there needs to be a firm cut-off based upon
9 the DFR law that the Court has already articulated.

10 THE COURT: Anything you want to add, Mr. Press?

11 MR. PRESS: Here is June 5. We have got evidence
12 of these resolutions or efforts to pass the resolutions and
13 you are going to see and documents coming up that a month
14 later Duane Woerth is in Dallas --

15 THE COURT: I saw that.

16 MR. PRESS: And his remarks made there have
17 evidentiary value themselves, some of them.

18 So we would ask that these documents that came in
19 without objection be allowed to go to the jury.

20 THE COURT: This is a very difficult issue.

21 MR. FRAM: Your Honor, if I may, I would suggest
22 unless any of the marks are backward looking. Duane Woerth
23 made a statement in September about something he had done in
24 mid 2001, there might be an argument that it would be
25 evidential. But unless he is talking about events that are

1 relevant to the case, this is simply going to confuse and is
2 going to, and will prejudice ALPA.

3 THE COURT: I am not going to I am not going to
4 allow in SSSSS, five S's.

5 The next document is five T's. 148. That is a
6 very lengthy report. I mean, this would be fully confusing
7 to the jury. There are all kinds of issues in this reported,
8 all kinds of discussions, that have nothing. The report is
9 an ALPA Exploratory Committee report to the APA board of
10 directors in 2001, so it is not a date issue.

11 MR. PRESS: Your Honor, I don't know how these got
12 messed up. But 148 4 L's, or maybe five L's is the same
13 document.

14 THE COURT: 148 5 T's is a memo from Rindfleisch to
15 Rindfleisch.

16 MR. PRESS: Right. D April 1.

17 THE COURT: I don't know why he is communicating
18 with himself.

19 MR. PRESS: It is dated April 1, Judge.

20 THE COURT: April 1, 2002. That is the memo. But
21 what he attaches.

22 MR. PRESS: Is the ALPA.

23 THE COURT: Of January, 001. Talking about looking
24 back. This looks back a full year.

25 MR. PRESS: This is, the report he attaches is

1 APA's, ALPA Exploratory Committee report, which is in
2 evidence itself as a different number.

3 THE COURT: What is it? I am really confused. It
4 is not really a time issue, because he is sending something
5 to himself which is, the jury will get nothing out of the
6 email. If they are going to get anything out of it, they are
7 going to get out of it the report, not the email. So it is
8 really, what is really at issue is the admissibility of the
9 exploratory report of the APA board of directors in 2001.

10 MR. PRESS: Which came in evidence through John
11 Clark already.

12 MR. KATZ: Then they don't need it.

13 MR. PRESS: Why is --

14 THE COURT: Tell me where it is in evidence with
15 John Clark. Show me. Give me a citation. 148, 4 L's?

16 MR. PRESS: No.

17 I don't think so I think that is something totally
18 different.

19 MR. FRAM: Five L's, your Honor.

20 THE COURT: That may be. I don't know.

21 (Pause) Yes, I think you are right. I think it is
22 5 L's.

23 MR. PRESS: I don't know why the dupe /PHREUBG
24 indication is made. I have no problem removing the five T's,
25 a copy of that same exhibit.

1 THE COURT: Here it is. 5 L's. It is either the
2 same, it is even the same cover memo, Rindfleisch to
3 Rindfleisch.

4 MR. PRESS: That was an error.

5 THE COURT: Looks like a complete duplicate.

6 MR. PRESS: It is, it is the precise same document.

7 THE COURT: I will let that in. Why Rindfleisch
8 choose to send that document to himself in April, 2002, I
9 have no idea. But maybe he wanted it to go from one computer
10 to another computer. But it is already in evidence. It
11 clearly relates to something that was a year earlier.

12 Okay. I am going to omit, I am going to remove
13 148, 5 T's. But not because it is not admissible, just
14 because it is a duplicate.

15 Okay.

16 MR. PRESS: Judge, we have the same problem with
17 UUUUU.

18 THE COURT: I got UUUUU.

19 MR. FRAM: Your Honor, I am told that U is a
20 /PHRAOUP /TKPWEUBGT of five M's.

21 MR. PRESS: It is.

22 THE COURT: So we can probably remove that.

23 Do you agree to that?

24 MR. PRESS: Yes, it is.

25 THE COURT: I am going to take 148 UUUUU out.

1 MS. RODRIGUEZ: As a duplicate also, right.

2 THE COURT: Yes, right. As a duplicate. I am
3 going to make it clear, I am going to put it is not in
4 evidence. /KHRAOEURLT M wasn't even contested.

5 MR. PRESS: The five V's and the five W's which are
6 the next two are also duplicative.

7 THE COURT: I have W. I am looking for V. Do you
8 agree that V and W are duplicates? Tell me what the
9 duplicates of.

10 MR. PRESS: They are duplicates of five N and 5 O.

11 THE COURT: 1 N and one O?

12 MR. PRESS: Five N /-S and 5 O's.

13 THE COURT: Five N /-S and 5 O's. Do you agree to
14 that?

15 MR. FRAM: Yes, your Honor.

16 THE COURT: So I am going to leave in five N and 5
17 O which are already in evidence and take out P-148 VVVVV,
18 take that out, and take out 148 5 W's. Okay.

19 THE COURT: That brings us to the tab of June,
20 2002. X. P-148 XX X.

21 MR. PRESS: I don't have a problem removing that.

22 THE COURT: I am going to tell you right now a lot
23 of the material from here to the end deals with the Dallas
24 lawsuit. And I really think that gets, talk about potential
25 for confusing the jury. So you agree that XXX can come out.

1 5 X's, I mean.

2 MR. PRESS: Yes.

3 THE COURT: XXXXX is not in evidence.

4 MR. PRESS: I believe the five Y's.

5 THE COURT: Let me find it first. The next one is
6 YYY.

7 MR. PRESS: No problem removing that.

8 THE COURT: Okay. 148 YYYYY, five Y's, not in
9 evidence.

10 Let me go to Z.

11 Then we are going to get to 6 A's.

12 What about Z.

13 MR. PRESS: This is Mr. Rindfleisch's monthly
14 update on the organizing activities at the union and he is
15 supplementing what is going on in American.

16 THE COURT: I am not going to let ZZZ in. I
17 already kept out a similar one that was much earlier.

18 MR. PRESS: The June 1.

19 THE COURT: P-148 Z's for the same reason. 5 Z's,
20 out.

21 MR. PRESS: Judge, we could short-circuit this and
22 just take everything else out.

23 THE COURT: Might as well do it right and look at
24 it. 6 A's. This really is confusing. Because it deals with
25 some kind of conflict between Woerth and Darrah. I mean

1 there is a lot of stuff in here that the jury has no idea
2 what this is about.

3 MR. PRESS: I have no problem removing it, Judge.

4 THE COURT: Okay. Then 148, 6 A's.

5 I would, would this be confusing.

6 Okay. I can't find it yet but what about BBB.

7 MR. PRESS: It refers to the fact that Duane will
8 be speaking in Dallas BBB, next Friday, July 28. We want
9 this to go back to the jury..

10 What is your position on this.

11 MR. FRAM: Same thing.

12 THE COURT: I am going to strike 148, 6 B's.

13 MR. FRAM: Thank you, your Honor.

14 THE COURT: Then there is C's. You don't really
15 try to get that in.

16 MR. PRESS: I don't have a problem removing that.

17 THE COURT: That is really far afield.

18 C's are out.

19 Hudson County prosecutor wants decided to help the
20 disadvantaged by hiring them to do filing in the prosecutor's
21 office. And they found out they had to post the alphabet
22 over the filing cabinets because if they didn't post the
23 alphabet, nothing would get filed in the right order.

24 That is the way I feel. I have to post the
25 alphabet so I can see it and make sure C comes before D. Do

1 you have a problem with taking D out?

2 MR. PRESS: No, your Honor.

3 THE COURT: Okay. D is not in evidence.

4 Believe it or not, I can't find E, I got F as the
5 next one.

6 MR. PRESS: They are out of order. I think E is
7 the last one, Judge.

8 THE COURT: Yeah, you are right. These are too far
9 afield.

10 MR. PRESS: I am sorry.

11 THE COURT: They are too far afield.

12 MR. PRESS: I understand your ruling, Judge.

13 THE COURT: I am going to take E and F out as well.

14 MR. PRESS: This is one that we would offer.

15 THE COURT: Which one, E or F.

16 MR. PRESS: Five E's.

17 THE COURT: Five E's.

18 MR. PRESS: Can't we read the word where Duane
19 Woerth says he is Wyatt Earp and Sky King in the same body.

20 THE COURT: Show me.

21 MR. PRESS: First page of the remarks on 5 E's.
22 Second paragraph.

23 THE COURT: I am Duane Woerth, Wyatt Earp, Sky
24 King, all in the same body.

25 MR. PRESS: And the jury is not going to get to

1 hear that.

2 MR. FRAM: They are not going to get to hear Bud
3 Bensel.

4 THE COURT: He is obviously the perfect man for a
5 diplomatic post.

6 He is Wyatt Earp and Sky King and Duane Woerth all
7 wrapped into one person.

8 No, I am not going to allow this. I admit there is
9 some appeal to letting the jury hear that and reading that
10 but I think his speech goes so far afield from what this case
11 is about that even if I could conjure up a minor bit of
12 relevance under 401, under 403, it is ultimately confusing.
13 I am sticking with what I said on 6 E's, and 6 F's.

14 Okay. That takes care of this issue.

15 That leaves to the lawyers to make the physical, as
16 I say, I haven't taken anything out of the binder. Will
17 somebody come and take this. Maryland Rodriguez is the only
18 one, five strong men here, the only person that gets up is
19 Ms. Rodriguez.

20 THE COURT: What time do you want to have the
21 argument. Two o'clock.

22 MR. FRAM: When is it convenient for your Honor.

23 THE COURT: It is not me, it is the people, the
24 court reporter needs arrest. You guys.

25 MR. JACOBSON: May I recommend we take a ten- or 15-

1 minute break so the staff can rest and go right to it and get
2 it done.

3 THE COURT: Okay with me. I got a chance to read
4 your brief this morning. I already read your brief. So I
5 got a chance to read the one that was mailed last night.

6 All right. Let's do this. Let's do it at one
7 o'clock. It is 20 of 1 now, according to my watch. We will
8 resume at one. Then why don't we plan to meet in my chambers
9 around three o'clock.

10 MS. RODRIGUEZ: Today.

11 THE COURT: Three, 3:30 3:15 or the charge.

12 MR. FRAM: Yes, your Honor.

13 THE COURT: That will give you time to do some more
14 reading.

15 MR. JACOBSON: Your Honor, I can tell you from the
16 plaintiffs side we read the charge, we have very few
17 comments.

18 THE COURT: What are whatever they are. I want to
19 get them on the record. I am not, I don't, I hope there are
20 not a lot of comments obviously. We prepared it in the hope,
21 with that hope in mind. Let's see, you saw the verdict
22 sheet, too. I did give you all the verdict sheets.

23 MS. RODRIGUEZ: Yes.

24 MR. FRAM: As a miscellaneous matter. I am told
25 the version of 137 that was in evidence is slightly different

1 from what I handed up today.

2 THE COURT: Well, the 137 was just one page, then
3 there is a big attachment to the other version.

4 MR. FRAM: Yes.

5 THE COURT: I am assuming that is the one with the
6 attachment is the one in evidence.

7 MR. FRAM: If we could substitute the one.

8 MS. RODRIGUEZ: The one with the attachment was not
9 the one that was in evidence. We don't have an objection to
10 that.

11 THE COURT: All right. There being no objection we
12 are going to substitute the one, that is what I asked my
13 courtroom deputy to do without asking you. To do it. But
14 you have agreed to do it. We will do it.

15 MR. FRAM: Thank you, your Honor.

16 THE COURT: Okay. All right. I will see you at
17 one o'clock.

18 (Recess.)

19 THE COURT: Good afternoon.

20 We are going to hear the Rule 50 motion filed by
21 defendants and responded to by plaintiff.

22 So whoever is going to handle it for the defendant,
23 Mr. Fram, is that you.

24 MR. FRAM: Yes, your Honor.

25 THE COURT: Go ahead.

1 MR. FRAM: May I stand at the lectern, your Honor?

2 THE COURT: You may stand wherever you want.

3 MR. FRAM: Thank you.

4 THE COURT: Go ahead.

5 MR. FRAM: Your Honor, I think the crux of this
6 case really focuses on what happened on April 2 of 2001 and
7 the event leading up to that. And the law is --

8 THE COURT: Let me stop you right there. I know
9 that that is your position in your brief. But the fact that
10 they waived scope on April 2, remember, the integration issue
11 wasn't resolved by that. All that did was waive scope. I
12 mean, which, as I understand it, all it did is waive
13 independent arbitration as a remedy for deadlock. But it
14 didn't, these parties were negotiating continuously. In
15 fact, they had merger committees, each side, had a merger
16 committee, so it wasn't like the issue of integration was
17 over you.

18 THE COURT: That is what you want me to rule, once
19 they waive scope it was over.

20 MR. FRAM: No, your Honor.

21 THE COURT: It was not over.

22 MR. FRAM: I agree, your Honor. We are not
23 arguing, your Honor, that the case is over after --

24 THE COURT: Not the case, but that the issue of
25 whether a, whether ALPA was infected with a conflict of

1 interest which dictated their actions in some fashion. That
2 doesn't go away because on April 2 they waive the scope.

3 MR. FRAM: I agree with that, your Honor. But I
4 think we have to look at the specific allegations made by the
5 plaintiff with respect to the specific decision points. And
6 the idea that there was a conflict of interest, your Honor,
7 is out there, and if this were a case where based upon the
8 conflict of interest ALPA did something to help the APA, at
9 the expense of the TWA pilots, that would be one thing but it
10 is not.

11 That is their evidence of bad faith. We know, that
12 bad faith has to result in three things. One, it has to
13 result in conduct that is fraudulent or dishonest in some
14 fashion on the part of ALPA two, that conduct has to be
15 relied upon in some fashion by the union members. This is
16 why I focus on April 2, and 3, that reliance, and whatever
17 decision is made by the union members, has to result in a
18 different outcome. It has to result in injury.

19 THE COURT: I have accepted that as a premise. For
20 this trial, you have to prove there is injury in fact.

21 MR. FRAM: Exactly. You have to prove there was
22 some outcome that was different.

23 We submit when you start by looking at the event
24 leading up April 2 and I will come to events after that in a
25 moment that's correct there is no evidence of fraudulent

1 conduct, material misrepresentation, or omissions, or
2 anything of the like.

3 And I was interested to read in the opposition
4 brief to see what are the plaintiffs pointing to when they
5 try to argue that there is such misconduct and they refer to
6 three things. One, they claim that misinformation was
7 provided. Bad advice about the right to strike. And I think
8 you know from the full evidence that there is a distinction
9 between the right to strike against TWA, Inc., and the right
10 to strike against LLC.

11 THE COURT: Say that again.

12 MR. FRAM: You may recall, your Honor, that the
13 testimony of Warner and Seltzer is that there clearly is a
14 right to strike against TWA, Inc., if the Section 1113 motion
15 is granted.

16 But that if the motion is granted and the
17 employees, the pilots then became employees of TWA, LLC, what
18 Seltzer told us is that it is very unclear, it is a very
19 different issue.

20 THE COURT: Let's assume whether they have a right
21 to strike is unclear, and maybe that depends on whether they
22 are deemed a successor or not which he said in his mind it
23 was unclear issue. Let's assume that is correct.

24 Are you telling me that where the right to strike
25 is a debatable issue, unions haven't struck.

1 MR. FRAM: No, your Honor. What I am saying is
2 that the plaintiff has not produced any evidence that the
3 extent they claim they were misled about the right to strike,
4 their claim I think is that they were told that you have no
5 right to strike when in fact they did.

6 And the point on that, your Honor, is that they had
7 no testimony, there is no evidence that they would have
8 struck if they were told they had the right to do it and
9 there is no evidence if they had gone on strike that that
10 would have gotten them into a better position, that they
11 could prove an outcome that was better. All we have is
12 speculation about what might have happened and I think based
13 upon the evidence your Honor appreciation that the idea of
14 striking, even if you have a right to do it, is potentially
15 disastrous, in light of what people knew, leading up to April
16 2.

17 So that alleged omission or misrepresentation about
18 the right to strike we submit is not one that any reasonable
19 jury could rely upon.

20 The second thing they point to, your Honor, is this
21 allegation that the union, the members of the MEC were
22 somehow misled into thinking that they couldn't put the
23 contract out for membership ratification.

24 Well, that is an entirety, and I am just referring
25 your Honor to the plaintiff's brief. That is an entirety

1 procedural matter. And the idea that the MEC voted to accept
2 a new collective bargaining agreement to waive scope, the
3 idea that they should have or could have been overruled by
4 the membership, again, that is not something that goes
5 anywhere in terms of DFR violation, your Honor.

6 The third thing they allude to and they don't
7 really discuss it is the idea that they could avoid more time
8 to negotiate by filing the lawsuit that Roland Wilder
9 recommended. Go in and enjoin the entire transaction.

10 I believe your Honor will recall from our trial
11 brief, and we have incorporated some of the same arguments
12 that the issue of whether that lawsuit had any merit is a
13 legal issue for the Court and we ask the Court to rule as a
14 matter of law that it was not a misrepresentation or bad
15 advice on the part of the ALPA advisors to tell the members
16 of the MEC that this was a bad idea, it was something they
17 shouldn't do.

18 And I submit that there is no evidence from the
19 plaintiff's side --

20 THE COURT: Well, if something is a bad idea, is
21 illusive, that is a different question, isn't it?

22 MR. FRAM: Perhaps more precise, I think the point
23 we make, your Honor, is that there was no legal merit to the
24 lawsuit and moreover, as a practical matter, even if there
25 was, it would not have --

1 THE COURT: Which lawsuit? Which one? There are
2 three lawsuits.

3 MR. FRAM: The lawsuit to enjoin the entire
4 transaction between American and TWA, until the grievance
5 filed against TWA for agreeing away scope --

6 THE COURT: The agreement itself was a violation of
7 the contract.

8 MR. FRAM: Yes, your Honor. You heard Mr. Seltzer
9 talk about how even if you could get an injunction issued,
10 there would have to be a bond, the practical issues, the
11 legal issues.

12 And again, we submit that the Court should rule as
13 a matter of law that there was no legal basis to file a
14 lawsuit, it would have violated the automatic stay under
15 section 352, it would have rejected, but even if this if
16 there was a basis, there is no evidence that it was bad
17 advice to not pursue that lawsuit because even if you are
18 going to join the whole transaction, what have you done, you
19 have blown up the whole deal. What is telling is I read
20 through the opposition brief, there is no argument advanced
21 that advice given with respect to the Section 1113 motion
22 itself and the likely outcome is made here. And I think that
23 is important.

24 So when we go through, your Honor, and look at what
25 the plaintiffs are saying, we submit that there are no

1 misrepresentations, or material omissions. There is no
2 evidence in the record that the plaintiffs, the TWA MEC in
3 making their decision on the second was in any way misled,
4 that they would have done things differently. Different
5 advisor predictions had been made and even if they had, even
6 if they had gone on strike, or had tried to go down the road
7 that Mr. Wilder was recommending, there is no evidence in the
8 record that the outcome would have been better. The outcome,
9 in all likelihood, would have been different, but we submit
10 that it would have been worse and there is nothing to suggest
11 that, to the contrary.

12 So our request, your Honor, is to dismiss any claim
13 of the plaintiffs for lack of proof a reasonable jury can
14 rely upon to find a DFR violation leading up April 2, 2001 or
15 in connection with that decision. It was a good decision.
16 It was the right decision. Get a new collective bargaining
17 agreement, protect the jobs of the pilots, and deal with
18 seniority integration later on.

19 And if the Court is not prepared to make that
20 ruling now, we do request that any claim based upon the
21 argument that Mr. Wilder's advice to file this lawsuit should
22 have been followed be excluded from the case, and that the
23 jury be instructed accordingly, that they cannot find a DFR
24 violation based upon advice to not go to court and try to
25 upset the entire apple cart, your Honor.

1 I would note with respect April 2 that the advice,
2 the statements being made, to the TWA MEC are statements that
3 are not all been being made, your Honor, on behalf of ALPA.
4 You recall there are independent advisors who have been
5 engaged directly by the MEC, you have not just Wilder but you
6 have Glanzer, you have Steve Tumblin, an outside lawyer, and
7 you have Randy Babbitt, who as we heard today, is directly
8 engaged by the MEC.

9 I think what is very important here from the
10 perspective of reliance and causations that those advisors,
11 with the exception of Wilder, in terms of the tactical issue,
12 those advisors are not ALPA. Any statements they make cannot
13 be attributed to ALPA. But their advice --

14 THE COURT: Let me ask you this: If Babbitt, what
15 do you think Babbitt would have said if he was told that
16 people at ALPA were working with pilots at American to
17 conduct a card campaign for representation? What do you
18 think, if somebody told him that, what do you think he would
19 have said?

20 MR. FRAM: I hesitate to speculate.

21 THE COURT: Why is it speculation?

22 MR. FRAM: Well --

23 THE COURT: You don't think you know what he would
24 have said?

25 MR. FRAM: If he was told, your Honor, that

1 American pilots independently --

2 THE COURT: Not if he told your version of the
3 facts, let's assume he is told a version the jury might find.

4 MR. FRAM: I think my version is American pilots
5 independently began a card campaign.

6 THE COURT: You want that word, "independently."
7 But it would have been very easy to ALPA to say to Hunnibell
8 or Clark, don't talk to me, don't write to me, don't email to
9 me, I can have nothing to do with this. Rather, what you
10 have are innumerable, many emails, I don't know if we have
11 them all, but a tremendous number of emails, meetings where
12 they are meeting, I guess in Las Vegas that they met.

13 MR. JACOBSON: Washington, D.C.

14 THE COURT: Meetings where the cards are turned
15 over. I mean it is very easy to say don't give me any cards,
16 don't give me cards. What are you giving them to me for? I
17 mean you want me to find that it was independent. But I am
18 not going to do that. Whether the efforts of Hunnibell and
19 Clark were independent or not independent. It is for the
20 jury to decide.

21 MR. FRAM: I agree, but with respect April 2 the
22 card campaign didn't exist. It didn't start until May.
23 Those are the undisputed facts. And the undisputed facts
24 also are that none of advisors --

25 THE COURT: Let's assume you are right. I don't

1 know right now sitting here in my head I don't have the
2 dates. Let's assume you are right it didn't start until May.
3 Remember, the integration negotiations were going on, and
4 obviously, although because of the waiver of scope, the TWA
5 pilots had lost leverage. They were not without zero
6 leverage.

7 I mean, I don't think APA ever took the position we
8 are going to staple 2,300 pilots to the bottom of the list.
9 There may have been back and forth, 800, 1,200, 700. But the
10 notion that -- so APA, there were some, even if it was just a
11 moral high ground, ALPA was not without some leverage in that
12 negotiation. The negotiations went on, there were proposals,
13 counter proposals. And so that was ongoing, after April 2.
14 April 2 took away one possible leverage, the possibility of
15 an independent arbitrator. Although that could have been
16 agreed to. Even though they waived it, it is possible it
17 could have been agreed to between the parties. But --

18 MR. FRAM: Your Honor, my point with respect to the
19 timing of the card campaign and these independent advisors,
20 A, that nobody could have known about the card campaign
21 during the period leading up April 2, and there is no
22 evidence that any of the independent advisors were even some
23 of the ALPA advisors knew about -- well, they couldn't have
24 known about the card campaign, so my point is how could they
25 be motivated by bad faith if it didn't exist.

1 THE COURT: Well, you in your life as litigator and
2 mine in my distant life as far, far away, a long time ago,
3 life as a litigator, we have dealt with experts before. And
4 experts can often be influenced by what they sense they want
5 their clients to say. The attitude of the clients, an
6 expert's reaction to a situation, you know, if he is talking
7 to people who are pushing one way, that may affect the way
8 they approach their case, if they are pushing -- if the
9 client is pushing another way, that may also influence him.

10 MR. FRAM: Two points, your Honor. One, I think we
11 need to distinguish between who is ALPA and who is not.
12 Tumblin is not ALPA. Glanzer is not ALPA. Wilder is not
13 ALPA.

14 THE COURT: No, but they are people hired.

15 MR. FRAM: These are people hired by the MEC. They
16 are not ALPA. So you can't, even if you could somehow impute
17 in the absence of any evidence bad faith to them, there is no
18 basis for it. Seltzer, Seltzer is an outside lawyer. He
19 happens to represent ALPA.

20 THE COURT: Let's assume you are right, that as of
21 April 2 there was no, nothing had happened. Why does that
22 MEC --

23 MR. FRAM: There is no evidence of bad faith.
24 There has to be, in addition to misrepresentation, dishonest
25 conduct, reliance and causation, there has got to be bad

1 faith.

2 THE COURT: You don't think it is dishonest conduct
3 to conduct a card campaign, to participate in a card campaign
4 with American pilots at the same time and not reveal that
5 fact fully and openly to the MEC?

6 MR. FRAM: Your Honor --

7 THE COURT: Even in July, August, September? I
8 don't think -- Supplement CC was what? November 8 or
9 something like that? Do I have the date right?

10 MR. PRESS: Yes, you do.

11 MR. FRAM: First of all, the card campaign was
12 known to everybody. The APA pilots were out there.
13 Everybody knew there was a card campaign. I think the
14 argument after it began in May --

15 THE COURT: No, I don't know if the evidence
16 supports that. The issue is not so much whether, was there a
17 card campaign is what was the role of ALPA in that card
18 campaign. Did they know that Ron Rindfleisch was having
19 continue flow of emails. Did they know that the cards were
20 being given to ALPA.

21 MR. FRAM: Your Honor, they knew that people at
22 ALPA were communicating with American pilots and you recall
23 Mike Day.

24 MR. PRESS: There is no evidence of that. Not one.

25 THE COURT: No, don't interrupt.

1 MR. PRESS I am sorry.

2 THE COURT: You will get your chance.

3 MR. FRAM: I asked Mike Day didn't you expect
4 people at ALPA National to be in communication with American
5 to find out what their positions were. Yeah, of course. We
6 know Duane Woerth was talking directly to John Darrah,
7 immediate of APA. We know he was talking to card I. There
8 were lots of communications back and forth. In addition to
9 the direct communications that were taking place between the
10 merger committee teas and the like.

11 THE COURT: You don't think the jury could say
12 given the clear conflicts between the APA pilots and the TWA
13 -- and the ALPA pilots, the TWA pilots and the American
14 pilots, that ALPA's position could be we are not going to
15 talk to you about the cards, don't send us any emails, we are
16 not going to send you any emails. For God's sake don't
17 submit any request for reimbursement for your expenses.
18 Don't you think, you know, I mean, does the MEC, the American
19 pilots -- the TWA pilots know that somebody at ALPA is
20 promising to reimburse the APA Pilots for their expenses?
21 Where is that in the record?

22 MR. FRAM: Your Honor, you already ruled on,
23 denying summary judgment, that that evidence could be
24 evidence of bad faith. I am not trying to reargue that.

25 What I am pointing out is that didn't exist as of

1 April 2.

2 THE COURT: Why do I have to cut everything off?
3 You take April 2. I admit when they waived their scope, that
4 reduced their leverage. But that didn't reduce the fact that
5 there was still ongoing negotiations. There were two
6 committees that were formed for that very purpose.

7 MR. FRAM: I agree that the --

8 THE COURT: The whole process was ongoing and there
9 was hope of getting some kind of agreement, almost up to the
10 last moment.

11 MR. FRAM: Your Honor --

12 THE COURT: The last moment being November 8 when
13 the Supplement CC was executed by American and APA.

14 MR. FRAM: Focusing on the actions of advisors up
15 April 2. You can't presume that they knew a card campaign
16 would happen later. You can't presume they were acting on
17 behalf of ALPA to further the interest of the American
18 pilots. There has got to be evidence of that. There is
19 none. There is no evidence that Tumblin or Wilder or
20 Glanzer, for example, were motivated by anything but to do
21 the best job.

22 This is not the pleadings phase, your Honor, of a
23 case, where you can make allegations of wrongful intent, and
24 the like, and have a chance to flush it out in discovery. We
25 have been through a long trial, and the fact of the matter is

1 there is no evidence whatsoever that those advisors knew
2 about the unity campaign or any of the other stuff and when
3 we go back to the issue of reliance and causation they gave
4 the same advice with the exception of the wrinkle with Wilder
5 who wants to file a lawsuit that has no legal merit, they
6 gave the same advice.

7 THE COURT: But remember, Tumblin I think was a
8 bankruptcy attorney.

9 MR. FRAM: Yes.

10 THE COURT: With Leboeuf Lamb.

11 MR. FRAM: Outside counsel.

12 THE COURT: Outside counsel, in the Salt Lake City
13 office.

14 MR. FRAM: With Judge Mabey as well.

15 THE COURT: Judge Mabey, right. The one person who
16 approached this task from a labor lawyer's point of view was
17 Roland Wilder.

18 MR. FRAM: The point is they are all giving the
19 same advice. What the plaintiffs were required to do as part
20 of their case certainly was to provide evidence, to adduce
21 every that these advisors were somehow acting in bad faith.
22 And there is nothing there. They didn't even call them.
23 They played a clip of testimony from, if you recall, from
24 Tumblin. They didn't present anything from Glanzer. The
25 material they presented from wild are Wilder didn't suggest

1 he was trying to curry favor with American.

2 THE COURT: Wilder testified that through a video
3 that he thought they would have had a better deal, they could
4 have gotten a better deal. Didn't he testify to that?

5 MR. FRAM: He testified that if he was able to
6 pursue his litigation theory, your Honor.

7 THE COURT: Yes. That his advice was followed.
8 His advice to members -- well, he had three litigation
9 strategies, two of them -- one was before April 2, the other
10 two were after April 2.

11 MR. FRAM: I will come to those in a minute.

12 THE COURT: Only the first one was before April 2.

13 MR. FRAM: I will come to those in a minute. My
14 point, your Honor, is that any claim of breach of the duty of
15 fair -- of the duty of fair representation as of April 2 is
16 not supported by the evidence. There is nothing to show
17 misrepresentations, nothing, even if we assumed bad faith in
18 some general sense, no misrepresentation, no evidence from
19 the plaintiffs of detrimental reliance as required by
20 Deboles, and no evidence --

21 THE COURT: Part of the problem is that a lot of
22 bad faith, it is not almost all bad faith, not 100 percent,
23 the great majority of bad faith cases oh rise out of
24 negotiation between management and the union. And you know,
25 we have all heard from, about sweetheart contracts, and

1 unions going into the tank because they are getting paid off
2 by some company in the tank in some way.

3 This is really a little different. This is a case
4 of union versus union. And two unions, not of their own
5 making, suddenly find themselves in very direct adversary
6 positions.

7 And. When there is a lawyer in the conflict the
8 lawyer would probably be barred from representing either
9 party. The lawyer would lose two clients probably in that
10 situation. He certainly won't be able to, you know, try to
11 solicit one side or the other side. I mean, for instance, on
12 the -- I am the grand jury Judge right now in Camden. I have
13 cases being prosecuted from Washington. They come running
14 in, a guy representing two targets. The next week or two he
15 pops up representing the key potential witnesses against him.
16 And he didn't see a problem: Then at some point he
17 represents the spouses.

18 I assure you, now he is representing nobody. I
19 mean could a jury find that given the very direct conflict
20 that there was here, that there was just a lot of things that
21 they should have, that ALPA should have done to make clear
22 that it was going to have no trust, not deal with ALPA -- not
23 deal with APA at all.

24 MR. FRAM: Your Honor.

25 THE COURT: And they didn't do that. They simply

1 didn't do that. So the jury could find.

2 MR. FRAM: Well, your Honor, I think what could be
3 argued from the plaintiff's side is that what ALPA should
4 have done is told, card I we won't have contact you with.

5 THE COURT: That is easy.

6 MR. FRAM: Yes, but what they did instead was to
7 tell them we don't do card campaigns but we are going to
8 listen to you.

9 THE COURT: You don't do card campaign but submit
10 all your expenses from the card campaigns and we will pay
11 them.

12 MR. FRAM: The lower level guy who didn't
13 understand the law said that. When others found out it was
14 ultimately decided we can't reimburse the expenses. Your
15 Honor, the evidence --

16 THE COURT: It was pretty late in the game before
17 Hunnibell and Clark new they weren't going to get their
18 money.

19 MR. FRAM: Hunnibell and Clark testified they
20 incurred their expenses, did everything they did before there
21 was discussion about reimbursement. It is not as though they
22 are out there incurring expenses and doing things based upon
23 a promise by ALPA to be reimbursed.

24 THE COURT: A conflict is a mindset. That is what
25 makes a case. It may be your salvation some day in the

1 Circuit or before the jury. I mean negotiations are very
2 subtle matters. How one negotiates. It is very, very
3 subtle. The strength of an employment negotiation.

4 Some clearly misguided sole described my technique
5 of negotiation as being massively unreasonable and forcing
6 everybody else to try to bring them back to rationality. And
7 you know you how one negotiates, the strength with which one
8 negotiates, can be influenced by one's perception of where
9 one's duties lie, or where one's obligations lie. I mean
10 conflicts are very tricky. On it is easy, some employer is
11 paying off a union official, to do a sweetheart contract.
12 Yeah. That fits very neatly into the duty of fair
13 representation.

14 I admit the plaintiff has a tough burden when you
15 are dealing with a conflict because unlike lawyers, you can
16 remove the lawyer from the case. That is not really feasible
17 in the labor context. You can't say that, to the TWA pilots
18 we are removing ALPA as your bargaining representative. Go
19 out and pick another, hire the Teamsters to bargain for you.
20 They can't do that.

21 MR. FRAM: Your Honor, I guess my point is that
22 before you even get to the issue of conflict, the plaintiffs
23 first must prove that there were misrepresentations, material
24 omissions, other misconduct, that they relied upon and that
25 there was an injury in fact. None of that is here. And then

1 with respect to --

2 THE COURT: Well, I mean could ALPA have come to
3 the MEC and said look, folks. We are not going to be
4 representing you, this is all over, when this is all over you
5 are going to be bound from us, we want to go after the
6 American pilots, the APA pilots at American. So we plan not
7 to bargain too hard. We don't want to upset them. We want
8 you to know that. We want you to know that that is what we
9 are going to do. We are going to take it easy in the
10 negotiations with them. We are not going to push too hard.
11 We don't want to get them angry. We may wind up in their
12 fold, when you try to bring the whole fold back into our
13 pasture. Could they have said that?

14 MR. FRAM: They couldn't, and they didn't, and they
15 wouldn't have, because they were not negotiating on behalf of
16 the TWA pilot. The TWA pilots, as you know, through the TWA
17 MEC did their own negotiations, they hired their own
18 consultants, and their own advisors, and those advisors
19 answered to them. You heard, your Honor, the testimony of
20 Mr. Baeler, the negotiations fellow they hired. They hired
21 Mr. Tanner. They hired other people directly and engaged in
22 negotiations directly and ALPA didn't do anything.

23 THE COURT: Well, as I understood we had one of
24 them testimony, Babbitt.

25 MR. FRAM: Baehler.

1 THE COURT: They are all experts, all experts have
2 to be approved by the president.

3 MR. FRAM: There wasn't a single expert or advisors
4 that they asked to retain that ALPA didn't approve and pay
5 for. ALPA was not negotiating and could never have been in a
6 position where they said we are not going to be with us. It
7 would have been the MEC.

8 As you know, we get into the fall of 2001, what
9 happens is that the members of the MEC, and the members of
10 the merger committee, they can't agree among themselves about
11 what to do. They can't agree and ultimately President Woerth
12 gets a little more actively involved and tries to get them
13 additional chances.

14 THE COURT: That is a problem which may in a sense
15 be a defense-oriented argument. It is very clear that the
16 TWA had a pretty senior pilot group because, which would be
17 characteristic of a shrinking airline, that they tend to have
18 more people, a lot of people at the senior level. And less
19 at the junior level. So the more senior TWA pilots, it was
20 very clear from the testimony, were not as worried about the
21 integration. They were going to come out fairly okay. No
22 matter what happens, the most senior, 400, 500, that group
23 was going to come out okay. Maybe not perfect, maybe not as
24 good as the date of hire type of integration. But they were
25 going to pretty much stay as captains, the captains would be

1 captains, the type of aircraft would probably not change,
2 particularly with some kind of protective fence around St.
3 Louis.

4 But 1,500 pilots, the loss of seniority is a senior
5 matter. I think it is fairly clear from the testimony we
6 heard today, the senior pilots were more anxious to see the
7 deal go through as well as the junior pilots, they stood to
8 lose a lot, were probably more willing to take risks. That
9 is a fact.

10 MR. FRAM: That is absolutely correct. It was
11 their responsibility under ALPA's Constitution and bylaws to
12 make a deal or not make a deal on behalf of the TWA pilots.
13 And any claim by the plaintiff that ALPA violated its duty of
14 fair representation has to look to what ALPA did or did not
15 do to support them. We know that ALPA hired or approved the
16 hiring of, and paid for every consultant they asked for. We
17 know that ALPA did a lot to support them including getting
18 the extra chance to talk to American. Mr. Woerth got on the
19 phone, talked to Compton, talked to Carty.

20 THE COURT: Compton is TWA.

21 MR. FRAM: Correct. A lot of effort was put into
22 positioning them. I think the only claim, the only real
23 claim that the plaintiffs have pursued with respect to the
24 events of the fall relates to the Bond Amendment. I don't
25 think it is a serious argument to say that ALPA breached its

1 duty of fair representation because Duane Woerth scowled.

2 THE COURT: It was lukewarm support. He wrote a
3 letter to Bond at the very end, right before it was passed,
4 he wrote a letter to Bond if I am not mistaken. I think it
5 is in evidence. But there is no indication, it would be a
6 fair argument of the fact that ALPA hardly unleashed its
7 allegedly potent public affairs capability, lobbying
8 capability, to go after this --

9 MR. FRAM: Your Honor, I am sure you recall this,
10 when the conference in the case on June 2 --

11 THE COURT: You are assuming I recall the
12 conference on June 2.

13 MR. FRAM: I am going to try to refresh your
14 recollection. One, in response to our trial brief we moved
15 if you recall to dismiss any claim based upon the failure of
16 the Bond Amendment to be enacted citing nor Pennington and
17 other law. Your Honor ruled that the plaintiffs could not
18 argue that if ALPA had done something different that the Bond
19 Amendment would have been enacted, that that would have been
20 speculative.

21 THE COURT: No, I am not saying they can say to a
22 jury it would have passed if something more had been done. But
23 their attitude, I think they said that, what they, whether
24 they were supportive or not supportive, I mean, they had
25 gotten an expert to give an opinion, somebody, but the last

1 paragraph of the guy's letter was very revealing, said look,
2 anybody who tells you they can predict whether a particular
3 amendment will pass or not pass in Congress needs to have his
4 head examined. That was pretty much the thrust of that
5 letter.

6 MR. FRAM: Your Honor did indicate that ALPA's
7 alleged failure --

8 THE COURT: ALPA didn't jump in with both feet to,
9 you know, support that effort.

10 MR. FRAM: Yes, your Honor --

11 THE COURT: Which was started by a group of pilots
12 who were kind of amateurs at the whole lobbying business. I
13 mean I literally looked up an address in a book and went to
14 see what they could do. They were not people who I think who
15 knew much about the ins and outs of lobbying, and they, well,
16 they got as far as getting the --

17 MR. FRAM: Your Honor ruled pretrial that evidence
18 about less than enthusiastic reported could be evidence of
19 bad faith. The question then becomes what action did ALPA
20 take that were harmful or what actions did it fail to take
21 that were based upon bad faith.

22 And we submit that there is nothing there. We
23 heard an argument that in December, that ALPA failed to
24 continue approving flight pay loss for certain individual
25 pilots. That is not a DFR obligation, a DFR violation, your

1 Honor. Other pilots continued to get flight pay loss and the
2 handful of pilots who didn't, how many months was ALPA going
3 go to subsidize pilots on Capitol Hill to push a bill --

4 THE COURT: We weren't talking about a huge
5 expense, an intensive lobbying effort even in the house which
6 is where the bill moved to after the Senate. It lasted a few
7 weeks, a month, it didn't last very long. They were going to
8 conference the bill right away. It was attached to a defense
9 spending bill. So they were going to conference that bill
10 within weeks, I assume. I mean we aren't talking about
11 pilots running around Washington for a year living off the
12 fat of the land. It was effort that would be measured in
13 weeks rather than months, or if months, just a couple of
14 months, not a huge period of time.

15 MR. FRAM: Your Honor, this was after, if you
16 recall, it was after Supplement CC and after it was reported
17 that Don Carty --

18 THE COURT: Yeah, it definitely was after CC.

19 MR. FRAM: Don Carty was reported as indicating if
20 the bill passed that he would close TWA LLC and all the TWA
21 pilots --

22 THE COURT: So he is lobbying with both feet. That
23 is for sure. He jumped in to the fray with both feet. I
24 would expect him to.

25 MR. FRAM: Would it have been responsible for ALPA

1 to push for that bill and get it enacted and then have all
2 the TWA pilots lose their jobs. I think, it is a rhetorical
3 question.

4 THE COURT: Well, if your argument, and it is one I
5 think you are probably permitted to make, then you are
6 arguing that you didn't want the bill passed. I mean you are
7 carrying water on both shoulders. On one hand you are saying
8 we did what we could, we wrote a letters supporting it. But
9 we really didn't want it to pass. Which is it? You did not
10 want it to pass because you thought it was a bad idea and
11 American would tank the whole TWA operation. Or did you
12 think it was a good idea, and it should pass?

13 MR. FRAM: Your Honor, we are --

14 THE COURT: You can't argue both side of that.

15 MR. FRAM: What we are arguing is when it became
16 clear that the bill would not pass and when Don Carty said
17 cut it out.

18 THE COURT: When did it became clear. I must
19 admit, it -- all I could get out of the evidence is, to flip,
20 it slipped through the Senate relatively easily. I don't
21 know if you know, it was a roll call vote. I don't know if
22 it went on the executive calendar. It slipped through
23 basically unopposed through the Senate. I don't know if it
24 got on the executive calendar or how it got through. That is
25 how most of those things get through, on the executive

1 calendar. But so be it. However it does through it got
2 through. It now goes to conference committee. All I can
3 gather, it sort of disappeared, it would make -- -- maybe it
4 was the Texas delegation. I don't know. There is nothing in
5 evidence on that.

6 MR. FRAM: The point, your Honor, is ALPA did
7 support it to a point and made a judgment after a point that
8 it was, A, unlikely to be enacted, and B, that it was
9 detrimental potentially to the TWA pilots to keep pushing. I
10 don't think there is any basis in the record for to you find
11 that those judgments about complex matters such as lobbying
12 were made in bad faith or had any effect.

13 The other argument I think that the plaintiffs
14 meaningful argument, other than --

15 THE COURT: Sorry. Other, what word.

16 MR. FRAM: The other argument, your Honor, that I
17 think the plaintiffs are still pressing with respect to the
18 fall is that ALPA should have approved Mr. Wilder's
19 litigation theories.

20 THE COURT: Which one?

21 MR. FRAM: Well, one theory, your Honor, was to sue
22 the APA and American Airlines. Arguing that American
23 Airlines -- that the APA has duties to the TWA pilots in
24 terms of negotiating with American about what might happen.

25 And the other is, as I recall, is to enjoin the

1 implementation of Supplement CC. And then I guess the
2 related one, your Honor, was to sue American for alleged
3 violation of its best efforts letter. And we know with
4 respect to that --

5 THE COURT: That did go to arbitration.

6 MR. FRAM: It went to arbitration.

7 THE COURT: I believe that went to the National
8 Mediation Board, went to the board of adjustment, went to
9 some --

10 MR. FRAM: System board of adjustment. As you
11 heard from Mr. Warner ALPA pursued that, he submitted briefs,
12 he presented testimony. It was a two-day hearing. We have
13 an April 18, 2002 decision from Arbitrator Bloch which says
14 no, American fulfilled that responsibility. So filing a
15 lawsuit with respect to that would have been meaningless, and
16 really ways full, and in terms of a lawsuit.

17 THE COURT: I think the original premise of the
18 lawsuit was going to be that American wouldn't process the
19 grievance.

20 MR. FRAM: And many agreed to do that.

21 THE COURT: American to some degree took the,
22 knocked the studs out of that theory by agreeing to process
23 the grievance.

24 MR. FRAM: The other theory was the APA, the union
25 representing the American pilots, owed responsibilities to

1 the TWA pilots because of their negotiations with American.
2 And as your Honor ruled in this litigation, not a viable
3 legal theory.

4 So how can the plaintiffs possibly be permitted to
5 argue to the jury that ALPA should have pursued that? You
6 can't be accused it seems to me, your Honor, of violating the
7 duty of fair representation by declining to pursue a lawsuit
8 that has no merit. The APA represented the American pilots,
9 it owed a fiduciary duty to them and solely to them. This
10 idea that there was a legal basis for that lawsuit never
11 supported by the plaintiff, and this, your Honor, I note is
12 an area where no testimony, no evidence from the plaintiffs'
13 side, if you recall their witnesses almost without exception,
14 your Honor, were pilot witnesses. They didn't bring Mr.
15 Wilder in. They showed his videotape. But other than to
16 throw out the concept of, they really didn't justify it. If
17 you recall, the ALPA legal staff took these proposals
18 seriously, you heard Mr. Warner testify about reviewing the
19 cases, writing up an extensive memo in conclusion with this
20 idea was fundamentally flawed.

21 The point, your Honor, with respect to those
22 proposed lawsuits in the fall is that ALPA cannot, no
23 reasonable jury can find that ALPA fell down in its duties to
24 the TWA pilots by not pursuing them. And we would ask the
25 Court to dismiss any claim based upon that, and to instruct

1 the jury that it can't consider that argument in terms of
2 deciding with respect to any other issues that there was a
3 DFR violation.

4 The final point I would make, your Honor, and you
5 have indicated you would, you read our brief, and we
6 certainly appreciate that. The final point I would make is
7 that the seniority integration ultimately imposed beyond
8 being imposed because of actions of the MEC, you recall they
9 were given a chance to agree do it, they were divided, they
10 couldn't agree, you got the senior versus the junior, the
11 evidence --

12 THE COURT: Hiring a professor to come up with a,
13 quote, fair integration proposal, which they did I guess in
14 the late spring, early summer of, some, should have had their
15 heads examined that. Was one of the screwy ideas of all
16 times.

17 MR. FRAM: ALPA said for that. ALPA didn't say we
18 will support you. They said if you think it is helpful we
19 will support it. They even had Duane Woerth make the video
20 to support the Rightful Place proposal. Duane Woerth
21 attended a session where he supported that further. You
22 could argue I suppose that that was a waste of time, but ALPA
23 didn't. Duane Woerth was out there supporting these people.

24 My point with respect to Supplement CC is the
25 undisputed evidence in the record --

1 THE COURT: How could he be criticized, that is ice
2 in the winter time, supporting that proposal.

3 MR. FRAM: But part of what the plaintiffs are
4 arguing, and I think you heard from, your Honor, is that
5 Duane Woerth didn't have enough of a presence, he wasn't
6 involved, I think you heard somebody criticize him at the
7 facilitation meeting because he wasn't aggressive enough. He
8 didn't threaten to break anyone's knees or slash tires, that
9 kind of thing.

10 THE COURT: Oh, I don't --

11 MR. FRAM: That kind of flavor. But the point is,
12 you saw the gentleman testify. He is a smart guy. He tried
13 to use the bully pulpit, the power of persuasion, and we all
14 know that there are different negotiation techniques. Some
15 are of the nature that I think your Honor described before,
16 that you were accused.

17 THE COURT: I am sorry.

18 MR. FRAM: Some are like the negotiation techniques
19 your Honor described before, where someone accused you or
20 complemented you for being very aggressive. That can be
21 effective. But we all know that more low-key persuasive
22 techniques can also be very effective.

23 THE COURT: I was very smart, when because when I
24 had a losing case you couldn't stop me from settling it.

25 MR. FRAM: That is what happened here. The people

1 at ALPA recommended an agreement of settlement. It had other
2 people in the MEC who wanted to go to court to file a lawsuit
3 and they did it and those lawsuits were dismissed, your Honor
4 dismissed them.

5 And my point, your Honor, is that the undisputed
6 evidence in the record here --

7 THE COURT: You mean in the three counts in this
8 very case that I dismissed.

9 MR. FRAM: Exactly. They wanted to file a lawsuit,
10 they filed a lawsuit against American, they filed a lawsuit
11 against the APA and they were dismissed. So how can you
12 argue that --

13 THE COURT: You got strung up on the ray of hope
14 doctrine.

15 MR. FRAM: Judge Fisher was right, yes, your Honor,
16 we did.

17 But in any event, the point going back to this
18 issue of misconduct, dishonesty, things that were done, there
19 has to be some reliance, the people making the decision in
20 this case, the MEC, had to have relied upon something ALPA
21 did and they didn't. The people pushing the case, rejected
22 ALPA's recommendation, that it takes that last agreement
23 offered by American and the undisputed evidence, and you
24 heard it from Steve Rautenberg, one of the pilots, you heard
25 it from David Holtzman, is that the deal imposed with

1 Supplement CC was worse in a couple respects. ALPA did its
2 best to save this MEC from itself. It was unsuccessful
3 because the MEC was internally divided. How did those
4 efforts to counsel the MEC to get them more opportunities to
5 interact and talk to American, and the APA, where is the
6 evidence that that was in bad faith or harmful? Maybe the
7 hard campaign something in the background and that is fine.
8 Go back to the Deboles, that is not enough to have bad faith.
9 There has to be dishonest conduct and misrepresentation
10 relevant to the decision to be made, there has to be reliance
11 of some kind and there has to be an outcome that is worse and
12 we have none of that.

13 THE COURT: Thank you very much.

14 MR. FRAM: Thank you, Mr. Fram. I don't know who
15 is going, Mr. Press.

16 MR. PRESS: Your Honor, we just heard defense
17 closing argument. They are taking Rule 50 and turning it on
18 its head. You are to view --

19 THE COURT: Did a good job, though, didn't he?

20 MR. PRESS: I wasn't persuaded.

21 THE COURT: You weren't?

22 MR. PRESS: No.

23 THE COURT: We are going to kick you off the jury
24 then.

25 MR. PRESS: Your Honor, as you know, the evidence

1 and all reasonable inferences from that evidence is to be
2 viewed in a light most favorable to our clients, and when you
3 do that you will find --

4 THE COURT: You even said that in a brief.

5 MR. PRESS: You will find there is substantial
6 evidence in this record to support findings of yes on both of
7 the questions that you had proposed to send to the jury. And
8 you should deny this motion, Judge.

9 THE COURT: Okay. Anything else by anybody?

10 MR. FRAM: No, thank you, your Honor.

11 MR. PRESS: No, your Honor.

12 THE COURT: I am going to deny the motion for
13 directed verdict, the Rule 50 directed verdict at this time.
14 I think there are, admittedly there are fragments, but there
15 are fragments of evidence flowing through this record, and I
16 guess I am most troubled by, but I think that it is not a
17 very subtle point that ALPA had a potential for conflict of
18 interest, a serious conflict of interest here. I mean there
19 was only two months before the American acquisition was
20 announced that they, that there was a unity resolution, I
21 think I have that right, the unity resolution was passed and
22 Woerth I think went down to speak to APA, and clearly, by the
23 way I find nothing wrong in any of that. It was done in
24 November, 2000, or earlier, to try and bring in American, you
25 know, and Fed Ex and UPS, and Continental, and anybody else

1 into the ALPA fold.

2 It was perfectly lawful, proper conduct. And
3 American would I think at that time may have been one of the
4 most prosperous American passenger carriers. And certainly
5 try to bring them into the ALPA fold. Perfectly proper. We
6 need to decide how one goes about doing that as a goal, under
7 the circumstances. It is perfectly legitimate.

8 But ones American announced its acquisition, and
9 required the waiver of the scope provisions in the ALPA
10 contract as a condition for the acquisition of a clearly a
11 failing airline, ALPA was very much in a conflict of interest
12 situation. And I simply don't believe, I mean I think a jury
13 could conclude they were certainly well aware there was a
14 conflict of interest inherent in that situation and the
15 question is how did they deal with it. I agree it is not
16 like a lawyer, you kick the lawyer off the case, and hire two
17 new lawyers.

18 You can't do that, you can't say I am going to fire
19 this union and say, well, bring the Teamsters in to negotiate
20 for us. You can't do that. I mean, the pilots, the TWA
21 pilots couldn't do that.

22 So I think it behooved ALPA, you know, to be like
23 Calpernia, Caesar's wife, and you know, be above and beyond
24 all reproach.

25 Again we have all the snippets of evidence relating

1 to the card campaign that was going on. We have
2 representations that it was going to be paid for. I mean the
3 expenses, whether it was going to be paid. That appears not
4 just once. But a couple of times. And I, as I recall, I
5 think it was when Clay Warner was on the stand and he had
6 proofread a letter where it said submitted. And he changed
7 the word to incurred. Which the net effect would be accurate
8 to expand the possible scope of reimbursement. He tried to
9 get around that by saying I was worried about fraudulent --
10 but nowhere was there -- Clay Warner is a pretty smart guy,
11 looks to me to be a pretty smart buy, nowhere does he say we
12 can't reimburse you for anything. While the integration
13 negotiations were still going on.

14 I think there are other bits of evidence
15 throughout, you know, even the, although here you talked
16 about it, the fee petition for fees in bankruptcy. What was
17 our contribution? Our contribution was keeping the union
18 out. Our contribution was seeing that they didn't make any
19 trouble. That is a contribution of some kind, but the
20 question is to whom.

21 I think I may have to revisit this issue. I think
22 the rule says when I deny a motion and submit it to a jury I
23 can reconsider this when the jury verdict comes back,
24 depending on what the verdict is.

25 But I am going to let it to go to the jury. I

1 think there is enough here, giving all inferences favorable
2 to the plaintiff. And the plaintiff ought to be thanked for
3 his very short argument. Not too many lawyers have the guts
4 to get up and do that. After hearing as talented an argument
5 as Mr. Fram made. When the juices start flowing and they go
6 argument for argument, case for case, evidence for evidence,
7 but Mr. Press had the courage just to say basically I get, I
8 got all the evidence I need, that is enough for me and I
9 think it is enough in this case. Again, the reaction of
10 ALPA, their dealings with Hunnibell and Clark, I found very
11 troubling.

12 I found the conflict would be readily apparent.
13 Warner seemed to me like a very bright, cautious, fellow. We
14 didn't hear from the top dog, the top lawyer, Jonathan Cohen,
15 we didn't hear from him. We heard from Holtzman who wasn't
16 technically in the legal department. He was in the
17 representation department. But he was a lawyer for all
18 intents and purposes, looks like a good lawyer. I just, it
19 is inconceivable that a jury could conclude that they were
20 well aware of the potential for conflict here. And instead
21 of taking the relatively simple steps they could have taken
22 to make it clear to the APA, it, they have nothing to do with
23 any organizational effort, that was cut off, and whatever the
24 reason they chose not to do that. And so I am going to deny
25 the motion.

1 I am going to submit the case to the jury and see
2 what happens after that.

3 MR. FRAM: Your Honor, will you permit the jury to
4 make decisions about whether Roland Wilder's theories had
5 merit?

6 THE COURT: I am not going to instruct them that
7 the theory had merit or doesn't have merit. We don't have
8 enough in this record, I am not even going to ask the jury to
9 consider that.

10 If it is suddenly an opinion -- the jury shouldn't
11 be deciding, you know, whether the theory, I am not so sure
12 that I have enough. I mean, you know, we have Roland Wilder
13 saying one thing, other people saying other things. You said
14 they have no merit. But if I had a dollar for every
15 meritless suit that is filed in this Court, I guess I would
16 be a wealthy man. I mean litigation has a time component.
17 Let's take even the issue, for instance, as to whether APA
18 had a duty of fair representation to the TWA pilots after
19 they became the bargaining agent for the combined group April
20 3rd.

21 When the National Board certified the results of
22 this, the 30 days had passed and they certified the result of
23 the single carrier determination.

24 The question is do they have a duty of fair
25 representation at an earlier time, maybe back in November.

1 On the surface you can right a slam bang brief that says they
2 have no duty, the only duty of owe fair representation -- I
3 am not so sure that isn't a trickier issue than it appears.

4 I can imagine some district judge finding that
5 there is some breaches of duty there, that arose even before
6 they were the certified bargaining agent, but you know, those
7 are issues that would take steps of exploration. That hadn't
8 been done. I am not going to tell the jury one way or the
9 other. I mean they have heard the testimony. They will make
10 a decision. You can argue as to the merits, you can argue
11 all advisors said the suits were of no merit. I will let you
12 say that.

13 MR. FRAM: Your Honor, we did brief those issues
14 fairly extensively in our trial brief.

15 THE COURT: Yes.

16 MR. FRAM: We would ask the Court to, if you are
17 denying --

18 THE COURT: I tell you right now I am not going to
19 give you a ruling that the suit has no merits, so the answer
20 is no.

21 And the issue is, were they five percent meritless,
22 ten percent meritless, 15 percent, do they pass the Rule 11
23 test or not, which is a completely different standard,
24 whether they pass a Rule 11 test. I am not ready to say
25 that.

1 You wrote a brief. You wrote a brief saying the
2 suit had no merit. Somebody else might write a brief saying
3 the suit had some merit. Roland Wilder, by all the
4 testimony, was a very successful, very honorable -- I have
5 heard nothing, he was a very honorable practitioner, did a
6 lot of work in this area. I am not going -- you are not
7 going to get a ruling out of me to the jury that the suits
8 are meritless. If that is error on my part. I think the
9 issue is far more subtle of that, the issue of whether the
10 suit should be brought or not brought, it is far more subtle
11 than an evaluation of the merits. Certainly there is no
12 testimony in this case that the suits didn't pass a Rule 11
13 test. I am not going to allow it.

14 I will allow you to rely on whatever testimony
15 their was, if somebody said the suit had no merit, you can
16 say that. If it is in the record I allow it. I am not going
17 to weigh in and -- telling the jury that the suits, filing
18 either of those, or three suits was meritless is tantamount
19 to directing a verdict. I am not going to do it. That is
20 what it is tantamount to a directed verdict.

21 MR. FRAM: That is what we requested consistently,
22 your Honor.

23 THE COURT: I know.

24 MR. FRAM: We are concerned the jury is going to be
25 able to address legal issues, to the extent there is a

1 dispute about what a reasonable lawyer would have done, the
2 plaintiffs are required to present expert testimony. They
3 didn't present any that was admissible. We understand the
4 Court's ruling.

5 THE COURT: Again, I recognize that that is, that
6 the question of bringing litigation really creates a very,
7 very difficult issue. But I don't think that just based on
8 the evidence before me there is really enough in the position
9 to say this suit was meritless. Somebody, I think the issues
10 are far more complicated.

11 We have -- I won't say this has never happened. I
12 think there are one or two cases around where duty of fir
13 representation was related to seniority integration. But it
14 is a very unusual case. Very, very unusual. This is not
15 just a case of where -- this is an issue of two unions in the
16 same field, and one, possibly wanting to take over the other
17 one, and a union in a position of lose-lose, I think it is a
18 very unusual situation. I think courts, had they been
19 facing, you know, Roland Wilder's suit, you might have gotten
20 some unusual results.

21 All the law is against it. Every bit of it. I
22 couldn't find anything favorable, but I was 100 percent sure
23 I was going to win the case. Guess what? I won it. There
24 was something about the case that told me, you can read all
25 the cases you want. Usually it is the other way around. And

1 I still managed to lose. But this was the reverse. This was
2 a very unusual case. It was a very unusual duty of fair
3 representation case. And I think that to predict how a court
4 will react in three different Wilder lawsuits would be very
5 difficult composition. And I am going to let the jury deal
6 with the record as of now.

7 All right.

8 You want to come up at three o'clock to discuss
9 the.

10 MR. PRESS: We can do it as early as you would like
11 to start.

12 (Off-the-record discussion)

13 MR. JACOBSON: The staff is agreeable. I talked to
14 them.

15 MR. FRAM: If we want to continue into it --

16 (Off-the-record discussion).

17 MR. FRAM: Your Honor, can we take five minutes? I
18 want to confer with my co-counsel.

19 THE COURT: Sure. I will give you all the time you
20 want. You tell me. Tell me what you want.

21 MR. FRAM: 15 minutes. Then we will be ready to
22 go.

23 THE COURT: Fine. Thank you.

24 (Recess)

25 THE COURT: Okay. This is a charge conference.

1 Mandated by the rules. For the record I have distributed to
2 counsel earlier, I guess around 8:15 this morning, a copy of
3 a draft jury charge. It is marked draft number 2 with the
4 date seven, 6, 2011. I also distributed a jury, proposed
5 jury verdict sheet, which is likewise marked draft number 2,
6 7/6/2011.

7 I am going to mark those as exhibits C1 and C 2.

8 Since I understand from comments that were made on
9 the record just before we took a short break today, that the
10 major objections, that the plaintiff had minor objections but
11 nothing too serious. But that the defendant did have real
12 objections and so I think just to save time, I will get right
13 to defendant's positions. So starting with page 1, and by
14 the way, I apologize because I am a fanatic on having
15 numbered pages and I wound up giving you a document with
16 unnumbered pages. I have no excuse for that. It is
17 inexcusable. But.

18 MS. RODRIGUEZ: We can number them.

19 THE COURT: You can number them. That doesn't mean
20 that I shouldn't have numbered them. Mr. Fram, you can
21 start about page 1.

22 MR. FRAM: Thank you, un.

23 THE COURT: Plunge ahead.

24 MR. FRAM: I have minor comments until we get to
25 the substantive charges.

1 THE COURT: Give me anything.

2 MR. FRAM: Your Honor, on page.

3 THE COURT: You can refer to the paragraph number.

4 MR. FRAM: Let me do that, your Honor.

5 THE COURT: Let's do it this way. Paragraph 1,
6 anything?

7 MR. FRAM: No.

8 THE COURT: Paragraph 2, judging the evidence,
9 anything on that.

10 MR. FRAM: No issues with that.

11 THE COURT: Three, burden of proof.

12 MR. FRAM: No issue there.

13 THE COURT: Four, evidence received in the case.

14 MR. FRAM: Second paragraph, we had some stipulated
15 facts. You don't think we ever read them to the jury.

16 THE COURT: I don't recall them.

17 MR. PRESS: No.

18 THE COURT: I know you did in the final pretrial
19 there is a six right in the beginning of the final pretrial
20 where the facts, not very much many but there were four or
21 five facts stipulated. But they never went to the jury.

22 MR. FRAM: They didn't. So my suggestion would be
23 to -- -

24 THE COURT: We still have Monday.

25 MR. PRESS: I would suggest delete that paragraph

1 in its entirety, wouldn't you?

2 MR. FRAM: I would be fine with that. I don't want
3 to confuse them and have them here about stipulated facts.

4 THE COURT: All right. We will eliminate the
5 paragraph on stipulated facts.

6 I said it is clear, you didn't stipulate very much.

7 Okay. Paragraph 5.

8 MR. PRESS: Wait. On the next page I had some
9 issues there, Judge.

10 THE COURT: Tell me what you have.

11 MR. PRESS: You heard testimony in the form of
12 depositions and interrogatories. There weren't any
13 interrogatories read to the jury.

14 THE COURT: I will eliminate reference to
15 interrogatories.

16 MR. PRESS: There are two more references in that
17 same paragraph.

18 THE COURT: We will take out any preferences to
19 that.

20 MR. FRAM: Your Honor, I had the same comment. On
21 that same page the next paragraph, referencing evidence of
22 exhibits. Reference any proposed testimony and proposed
23 exhibit. Will your Honor permit the jury to request
24 transcripts or read backs of testimony?

25 THE COURT: That is interesting. Let me have your

1 take on that. It is a very discretionary area. We do have
2 transcripts.

3 MR. FRAM: We do.

4 THE COURT: Because Lynne has prepared them for
5 every day. So we do have them. Of course, before you give
6 them in you have to go back through them, they have to be
7 edited to take out colloquy, and, it isn't quite as simple as
8 handing them. We have to make sure there isn't anything the
9 jury didn't hear in that.

10 MS. RODRIGUEZ: Right.

11 THE COURT: What is your take on this?

12 MR. FRAM: My reference, your Honor, would be to
13 permit the jury to read some of the transcripts or witness
14 testimony if it is helpful to them. I don't think you want
15 to encourage them to ask for a lot, but if there is something
16 in --

17 THE COURT: I am definitely not going to encourage
18 them to ask for it. You can count on that.

19 MR. FRAM: I would anticipate, your Honor, both
20 counsel referring to certain testimony particularly as
21 important.

22 THE COURT: That you are allowed to do.

23 MR. FRAM: The jury doesn't recall that or
24 disagree about what it is, I think they should have the
25 opportunity to --

1 THE COURT: But that sort of plays itself out when
2 the questions get asked. I mean, you know, we hear Clay
3 Warner's testimony.

4 MR. FRAM: I guess the question, your Honor, is do
5 you want to put something in the charge on to indicate that
6 they can have testimony provided, or are you okay if during
7 argument --

8 THE COURT: I would rather -- I have, by the way,
9 almost, maybe close to 100 percent of the time but when I
10 have had a transcript available because it was daily copy
11 being made, I have allowed it to be, I have allowed it to go
12 into the jury room and they can read it there or have it read
13 out here. Q and A. My preference has been to allow it.
14 Almost universally.

15 I have not, however, normally put an encouragement
16 to do it. What happens is they, I think the jury has picked
17 up that I have a transcript coming right in front of me. I
18 think the jury knows that already. I think if they want it.
19 But I have no objection whatever to you reading testimony. I
20 have no objection to you holding a transcript, you know, and
21 saying, you know, on June 8, whatever date, June 17, you
22 remember that so and so testified and he said the following.
23 I don't mind that. I think that is legitimate.

24 MR. FRAM: How do you feel about proceed projecting
25 a transcript page, if there is something of particular.

1 THE COURT: If it doesn't slow things down to the
2 end, oh, no, I allow that.

3 MR. FRAM: Very good.

4 THE COURT: I have seen some, I think in one case
5 where it was so effective I had to set the verdict aside.
6 Where they did a, on a computer, like a power point
7 presentation.

8 MR. FRAM: Yes.

9 THE COURT: Where they, you know, would quote
10 segments of testimony and it was deadly effective. It was
11 really effective. And I mean, if it doesn't get out of hand.
12 If you have snippets or you are asking for pages, that are
13 dynamite, I would let either of you do so, put them on.

14 MR. FRAM: Okay, great. Then in terms.

15 THE COURT: I have always allowed computers, Power
16 Point. Although the Power Point only, if it is other just
17 showing the transcript, that you don't have to do in advance.
18 But if it is something else, I mean where you are actually
19 creating charts or creating things, I request that you show
20 it to the other side. Do you follow me?

21 MR. FRAM: Yes, your Honor.

22 THE COURT: You have a chart or making bullet
23 points. And you are going to show it through a power point
24 presentation. Then I require you pass it by the other side.

25 MR. FRAM: Yes, your Honor. All right. Then I

1 don't think there has to be any change to the paragraph that
2 led to this discussion.

3 THE COURT: Okay. I will eliminate reference to
4 stipulated facts and I will eliminate references to
5 interrogatories. Five is questions are not evidence.

6 MR. FRAM: No issue there.

7 THE COURT: Inferences from evidence.

8 MR. PRESS: Fine.

9 MR. FRAM: Can I go back to five. I hope your
10 Honor doesn't take offense to this but there were a couple of
11 points where your Honor asked questions of witnesses.

12 THE COURT: I think I say in this charge multiple
13 times, multiple times, from the very beginning to the very
14 end, that I, that I may have asked questions but it is not to
15 express any opinion. I think I say that more than once in
16 here.

17 MS. RODRIGUEZ: You say it in eight.

18 MR. FRAM: I was thinking that questions, you say
19 questions, objections, statements, questions from counsel or
20 the Court.

21 THE COURT: Oh, I will add that.

22 MR. FRAM: Then the rest flows from that.

23 THE COURT: I will add that.

24 MR. FRAM: Thank you, your Honor.

25 THE COURT: You will find it elsewhere in here. In

1 fact more than once. I think you will find it at least
2 twice. At the beginning and end. No problem. 6, nothing.

3 MR. FRAM: That is fine.

4 THE COURT: Direct and circumstantial E.

5 MR. FRAM: That looks standard, your Honor.

6 THE COURT: That is copied right out of the charge
7 book. Jury recollection controls. Paragraph 8.

8 MR. FRAM: Fine.

9 THE COURT: Juror notes. Paragraph 9.

10 MR. FRAM: Fine.

11 THE COURT: 10, credibility. I think this is
12 pretty much taken out of the standard charge, the circuit
13 standard charge.

14 MR. FRAM: Looks fine, your Honor.

15 THE COURT: Okay. Next is 11.

16 MR. FRAM: That is fine, your Honor.

17 THE COURT: 11. Number of witnesses. 12. Prior
18 inconsistent statements.

19 MR. FRAM: Looks standard, your Honor.

20 THE COURT: I think it is taken right out of--

21 MR. PRESS: Third paragraph on page 13, makes a
22 reference to affidavits and answers to.

23 THE COURT: Where?

24 MR. PRESS: Third paragraph of instruction number
25 12.

1 THE COURT: Tell me.

2 MR. PRESS: Refers to affidavits and interrogatory
3 answers.

4 THE COURT: You only used depositions.

5 MR. FRAM: We actually did have an affidavit, your
6 Honor. We had an affidavit from Mr. Wilder that went into
7 evidence. We would like that to stay in. I agree with
8 counsel that any reference to interrogatories.

9 THE COURT: Interrogatories.

10 MR. PRESS: Fine.

11 THE COURT: All right. I will take that out. I
12 will remove any reference to interrogatories.

13 MR. KATZ: Affidavit or declarations.

14 MR. FRAM: It may have been couched as a
15 declaration.

16 MR. KATZ: There was a declaration from Terry Hayes
17 that was a declaration.

18 MR. FRAM: That's right. The declaration to
19 support the 1113 motion.

20 MR. KATZ: There is no sworn certification which is
21 in --

22 THE COURT: Point to me where you want to make a
23 change.

24 MR. FRAM: Prior statements that were made under
25 oath, for example, at a deposition or in an affidavit or

1 declaration: Technically a declaration is not made under
2 oath but it is made subject to the penalties of perjury.

3 THE COURT: You have, for example, in a deposition
4 in an affidavit or declaration.

5 MR. FRAM: Yes.

6 THE COURT: All right. You have no objection to
7 that?

8 MR. PRESS: No, Judge.

9 THE COURT: After the word affidavit.

10 THE COURT: 13.

11 MR. FRAM: The second paragraph of 13, second line,
12 second sentence, this duty is known as the duty of fair
13 representation and is similar to fiduciary duty and the duty
14 of undivided loyalty. We would ask your Honor to strike and
15 the duty of undivided loyalty. Of course the duty of
16 undivided loyalty is a kind of fiduciary duty, but it is not
17 one that is recognized in the duty of fair representation
18 law.

19 And I think, we think it is contrary to O'Neill.
20 O'Neill contains the statements that a duty of fair
21 representation is akin to fiduciary duty. We are concerned
22 that injecting the idea of undivided loyalty and then also,
23 your Honor, there is an allusion, a reference two pages on --

24 THE COURT: Let's stick with this one for the
25 moment.

1 MR. FRAM: We are concerned about trying to
2 analogize or incorporate the more general fiduciary
3 responsibilities into the charge that are not specific to the
4 duty of fair representation. We all know, to paraphrase
5 Justice Cardozo, to say that something is fiduciary is only
6 the beginning of the inquiry.

7 There are many different types of fiduciary duties
8 from the highest trustee, undivided loyalty, must act in the
9 best interest, all the way down to the fiduciary duties of
10 corporate officers and directors which is to act within the
11 ambit of the business judgment rule. And the duty of fair
12 representation is specific, and we are concerned about
13 injecting context that don't apply and that are going to
14 confuse the jurors. And undivided loyalty is one of those.

15 Obviously, ALPA, as your Honor knows, represents
16 many, many different pilot groups, and there are probably --

17 THE COURT: 60.

18 MR. FRAM: 60. And there are points at which the
19 interest of those groups may have conflicted. ALPA is not
20 like a lawyer, as your Honor acknowledged earlier today.

21 THE COURT: Yeah. For a lot of very practical
22 reasons, is not like a lawyer.

23 MR. FRAM: We don't want to get people thinking
24 about trusteeship or fiduciary responsibilities of lawyers.

25 THE COURT: Let me first hear what Mr. Press has to

1 say.

2 I have a suggestion I am going to make. I want to
3 hear from Mr. Press.

4 MR. PRESS: There is, the case law has defined or
5 likened the duty to a fiduciary one, but the undivided
6 loyalty, Judge, I assume that you read some case where you
7 found that because it was not in the materials that we gave
8 you in support of our --

9 THE COURT: I think we found it. Interestingly
10 enough, I have a little problem with fiduciary duty only
11 because, even though I put it in, I had a problem, I have, as
12 I was reading it, I was having a little problem with it.
13 Even though it is in that, that phrase is in the case law. I
14 worry about a jury understanding what that really means. I
15 mean I could, I suppose I could write a book on what
16 fiduciary duty means.

17 I could go to Blacks Law Dictionary and, you know,
18 and whip out a definition of fiduciary duty. I am sure I
19 could find case law in all kinds of contexts. That is what
20 we normally get a lot of stuff about the duty of a
21 fiduciaries and guardianships, things like that.

22 MR. PRESS: The plaintiffs will not object if you
23 remove the second sentence from that paragraph.

24 MR. FRAM: We request that as well, and we request
25 that the other sentence, two pages on --

1 THE COURT: I was going to make a different
2 suggestion. This duty is known as the -- this is the second
3 sentence of the second paragraph. Right. This duty is known
4 as the duty of fair representation, and requires a union to
5 act in the best interests of its members.

6 MR. PRESS: That is great.

7 THE COURT: That is something, A, a jury will
8 understands. It won't get them involved in what is a
9 fiduciary, what is not a fiduciary, it won't get them
10 involved in what is an undivided loyal -- what is a divided
11 duty of law or undivided duty of law.

12 MR. FRAM: The only concern I have about that is
13 that the duty of, courts have held is subject to a highly
14 deferential standard.

15 THE COURT: That comes up later.

16 MR. FRAM: Perhaps you could say the best interests
17 in the way that I will describe that for you in this
18 instruction.

19 THE COURT: I don't mind that either.

20 MR. FRAM: Thank you.

21 THE COURT: Give me time to come up with that.

22 MR. FRAM: Of course.

23 THE COURT: Here is what I propose.

24 This duty is known as the duty of fair
25 representation and requires you to act in the a union to act

1 in the best interests of its members in the manner I will
2 describe to you hereafter.

3 MR. FRAM: Thank you, your Honor. That is great.

4 THE COURT: Is that okay with you, Mr. Press?

5 MR. PRESS: It is, Judge.

6 THE COURT: Anything else in paragraph 13?

7 MR. FRAM: Your Honor, at the end. Just before the
8 last paragraph.

9 THE COURT: Just a minute. The last paragraph
10 appears alone on the page. You are talking about the
11 penultimate paragraph.

12 MR. FRAM: It says as I mentioned earlier.

13 THE COURT: Oh, yes. That is the last paragraph.

14 MR. FRAM: Your Honor, we think it is important in
15 the instruction to identify to the jury that there are
16 different sets of issues here, and I think you know we
17 conceptualize the case event leading up April 2 which really
18 seems to be a fraud, misrepresentation kind of a theory and
19 events afterwards.

20 I think it is very helpful to them in considering
21 the evidence in the charge to be advised that there are sets
22 of issues. As opposed to not outlining that for them. We
23 have proposed --

24 THE COURT: This paragraph is a whole different
25 issue. The paragraph I am reading here, just to tell the

1 jury that they shouldn't be influenced by the fact that it is
2 a class action. Isn't that all that case.

3 MR. FRAM: We are asking before that paragraph that
4 something be inserted.

5 THE COURT: I see. You don't want to change that
6 paragraph. You want something in before it.

7 MR. FRAM: I am fine with that paragraph. But we
8 think they need a little bit more guidance.

9 THE COURT: By the way, I already told them that.
10 This is something I something I told them almost
11 word-for-word at the beginning of the case if I am not
12 mistaken.

13 MR. FRAM: Yes.

14 THE COURT: I said this almost word-for-word in the
15 opening charge that very statement.

16 MR. FRAM: Yes, your Honor.

17 THE COURT: Give me some notion, I am still a
18 little in the air what you are looking for.

19 MR. FRAM: Does your Honor have close at hand --

20 THE COURT: I have the earlier -- I have something
21 that I created out of your two drafts to me. So if you have
22 some language that you used previously, I have it here.

23 MR. FRAM: It would have been, your Honor, on the
24 joint draft at page 30.

25 THE COURT: I don't have page numbers. Just give me

1 the paragraph number.

2 MS. RODRIGUEZ: We don't have it either. If he
3 could read it.

4 THE COURT: 13 was nature of the claim.

5 MR. FRAM: What I am referring to, your Honor, is
6 our proposed charge 14, it is part of 14 C.

7 THE COURT: I may have that. Hold on.

8 14 C. A union violates its duty of fair
9 representation.

10 MR. FRAM: No, your Honor. The one, I don't see
11 that in what I am looking at.

12 THE COURT: Read what you are looking at.

13 MR. FRAM: I will read it. The paragraph we would
14 ask the Court to include. The plaintiffs allege that ALPA
15 was motivated by bad faith in connection with two sets of
16 issues. First, plaintiffs claim that ALPA --

17 THE COURT: Wait.

18 MR. FRAM: In bad faith.

19 THE COURT: Let me see if I can find that in the
20 other draft.

21 MS. RODRIGUEZ: We don't have the joint draft.

22 THE COURT: This is something I created myself.
23 This is not anything you have.

24 MS. RODRIGUEZ: I know.

25 MR. FRAM: I am quoting from the joint document

1 that counsel submitted on May 20. As part of what we had
2 proposed.

3 THE COURT: How does it begin?

4 MR. FRAM: Plaintiffs allege ALPA was motivated by
5 bad faith in connection with two sets of issues.

6 THE COURT: I am having trouble finding it.

7 MR. FRAM: Shall I just hand up the page?

8 THE COURT: Yes. Let me look at it.

9 (Pause) Did you see this. Practices.

10 MR. PRESS: I looked at it. I am familiar with it.
11 We of course object to that. It mischaracterizes what our
12 claim is all about.

13 THE COURT: Yeah. I mean what you are trying to do
14 is claim that the conflict, basically you want me to tell the
15 jury that the conflict of interest issue didn't arise until
16 after April 2 and therefore the claim for duty of breach of
17 the duty of fair representation up April 2 can only be based
18 on misrepresentation.

19 Isn't that what you are trying to do?

20 MR. FRAM: I am not trying to do that. What we are
21 trying to do is help them understand that the claim leading
22 up April 2 is part of the admission claim and the claim later
23 on is different in nature, that it is based I think upon the
24 alleged failure of ALPA to do certain things. We are not
25 trying to advocate and I would agree to modification of that.

1 We are just trying to help them conceptualize the issues a
2 little bit.

3 THE COURT: See, I don't accept that the material
4 representation issue is sort of, only goes up April 2. I
5 don't accept that.

6 MS. RODRIGUEZ: Nor did our case.

7 THE COURT: Well, I am just going by what the
8 evidence is that I heard. I think you can make a case that,
9 I think a jury could find in effect misrepresentation later
10 than that. So you are trying to sort of really bifurcate the
11 case, before and after April 2. And I am not going to do
12 that.

13 MR. FRAM: I understand, your Honor. I am not
14 aware of any claim of misrepresentation after April 2.

15 MR. PRESS: It continues. There was a continuous
16 fraud on the TWA pilots. You stated the claim, the nature of
17 our claim accurately, Judge. And I would ask that you reject
18 the proffered instruction from the defendant.

19 THE COURT: I mean, I think there, I mean, to the
20 extent that you are implying, I mean for instance, where it
21 says various kinds, I am going to do everything humanly
22 possible to help the TWA pilots, I think you said that on
23 more than one occasion, but meanwhile he is busy trying to
24 cozy up to the APA pilots. That is a misrepresentation. It
25 is selfless misrepresentation. And it may well be here that

1 the biggest misrepresentation from beginning to end in this
2 case is failure to tell the MEC, the TWA pilots, that hey,
3 look, you guys are going to be history soon. And we are
4 going to conduct ourselves in a way that doesn't create any
5 animosity with the APA pilots because we are anxious to bring
6 them into our fold when you leave us and join them. We are
7 anxious to bring you back with the other 11,000 of them. And
8 I just can't see, I know you want to do it, divide April 2 as
9 something, that is one case up to April 2, it is another case
10 afterwards.

11 I just went through the charge that I had, and I
12 think that is accurate. So I am going to give you this --

13 MR. FRAM: I understand, your Honor, thank you.

14 THE COURT: I am going to give you this back. Do
15 you want me to mark this for appellate purposes?

16 MR. FRAM: No, it has been submitted.

17 THE COURT: I want to make sure you preserve that.

18 MR. FRAM: Thank you, your Honor. I appreciate it.

19 MR. PRESS: Judge, I have one slight --

20 THE COURT: Go ahead. What paragraph?

21 MR. PRESS: Last paragraph of instruction 13. You
22 are talking about this is a class action, and.

23 THE COURT: Yes. As I mentioned earlier.

24 MR. PRESS: You shouldn't view that fact as making
25 plaintiffs claims any more true or likely. Can we add after

1 the word "more", "or less?"

2 THE COURT: I didn't say that? I think it should
3 be "more or less."

4 MR. PRESS: Thank you.

5 MS. RODRIGUEZ: Probably, your Honor, should it be
6 class action issue.

7 THE COURT: Say again?

8 MS. RODRIGUEZ: The last sentence, you must
9 evaluate the proofs as they are presented to you without
10 consideration of the class action. Issue. There is not
11 really a question before the jury with regard to the class
12 nature of it.

13 MR. PRESS: Status.

14 MS. RODRIGUEZ: Class action status.

15 THE COURT: All right. I will change the way it is
16 worded to status.

17 Okay. 14. Paragraph 14 is next.

18 MR. FRAM: Your Honor, the second paragraph of 14
19 we would ask your Honor to strike that first sentence.
20 Again, referring to fiduciary duties, and beneficiaries. We
21 think for the reasons discussed before it is confusing.

22 THE COURT: Did you agree to that?

23 MR. PRESS: Yes.

24 THE COURT: Okay.

25 MR. FRAM: We would ask your Honor --

1 THE COURT: Just a minute.

2 MR. FRAM: I am sorry.

3 THE COURT: Okay.

4 MR. FRAM: This is the point where we ask for more
5 detailed description of the limits of the duty. We have
6 proposed in our charge, in proposed charge 14 B, some
7 language that comes from Airline Pilots versus O'Neill, the
8 Supreme Court case and Stillworth versus Lawson, to the
9 effect that the breach of the duty of fair representation
10 claim is a, quote, "purposefully limited check," close quote,
11 on union's discretion and its representation of its members.

12 The language of the case goes on to indicate that a
13 review of union actions in the context of litigation must be
14 highly deferential. The deferential nature of review
15 recognizes, quote, "the wide latitude that negotiators need
16 for the effective performance of their bargaining
17 responsibility."

18 We have an entire paragraph from our proposed
19 charge that we think is essential so that the jury
20 understands in a more concrete way what the specifics of the
21 duty are and that, as indicates, dealing with some, with
22 other, with certain other fiduciary duties like those subject
23 to the business judgment rule that there is a fair amount of
24 latitude.

25 THE COURT: You are covering, in a different, in a

1 stronger way, I guess, from your point of view, the language
2 in the last paragraph of 14 that I have.

3 MR. FRAM: I think not only more strongly but in a
4 different way. We think that is essential language for the
5 standard. We would ask your Honor to add it, and perhaps --

6 THE COURT: I am trying to find it here.

7 MR. FRAM: We didn't see it, your Honor.

8 THE COURT: What?

9 MR. FRAM: We didn't see that language.

10 THE COURT: I am trying to find it in yours.

11 MR. FRAM: Do you have mine handy or should I hand
12 it up again?

13 THE COURT: Here. The cause of action is for the
14 breach of the duty of fair representation, is the
15 purposefully limited check.

16 MR. FRAM: Yes, that paragraph.

17 THE COURT: On a union's discretion and its
18 representative members. Therefore, any review of union
19 action within the context of litigation must be highly
20 deferential. This deferential review is designed to
21 recognize the wide latitude, et cetera.

22 MR. FRAM: That paragraph, your Honor.

23 THE COURT: I found it.

24 MR. FRAM: We request that that be inserted in
25 paragraph 14.

1 THE COURT: It would go either as a separate
2 paragraph or rewriting of the last paragraph. The last
3 paragraph, granted is a different way, the thought is pretty
4 much the same.

5 MR. FRAM: It might actually go, your Honor, before
6 that last paragraph, the one beginning I should emphasize.

7 THE COURT: Right.

8 MR. PRESS: May I speak on that?

9 THE COURT: Of course.

10 MR. PRESS: The proposed instruction that they are
11 offering provides no guidance on how to apply these standards
12 that they have articulated and as a result the instruction is
13 a roving commission and we ask it be rejected.

14 THE COURT: Is what?

15 MR. PRESS: Is a roving commission. It doesn't
16 provide guidance to the jury on how to reach its verdict.

17 MS. RODRIGUEZ: There is another problem with the
18 language as well. I think, that is why we cited to your
19 Honor the cases of Lewis and Aguinaga, which both talk about
20 when it is not in the context of a collective bargaining
21 agreement, they both distinguish ALPA versus O'Neill, when
22 the cases are not in connection with the collective
23 bargaining agreement.

24 So I don't think that the O'Neill language is even
25 relevant in this context.

1 THE COURT: Is this language that comes from
2 O'Neill?

3 MS. RODRIGUEZ: The language Mr. Fram read is from
4 O'Neill.

5 THE COURT: Mr. Fram, is that from O'Neill?

6 MR. FRAM: It is, your Honor, and of covers this is
7 a collective bargaining negotiation, that is their whole
8 claim, their primary claim in our view is in the context of
9 negotiating a new collective bargaining agreement, to give up
10 the old one with TWA, and enter the new one with TWA LLC
11 things happen that hunt of happened.

12 MS. RODRIGUEZ: Again, that is Mr. Fram's take on
13 our case, but that is not the plaintiff's case, your Honor.

14 THE COURT: What is your argument about why the
15 O'Neill language shouldn't be used?

16 MS. RODRIGUEZ: I think if you look at Lewis, and
17 United Food and Commercial Workers, they talk about the
18 context of the case being different but when you are talking
19 about an instance where the union infects the process, the
20 standard is different, and the O'Neill standard doesn't
21 apply.

22 MR. KATZ: Your Honor, it is not just the O'Neill
23 case that we are being talking about. Throughout the law of
24 duty of fair representation the courts have made clear that
25 it is not the province of the Court or the jury to put

1 themselves in the place of the union and make a judgment
2 about who whether the union made a good decision or a bad
3 decision. That is the whole notion of giving a wide degree
4 of latitude to the union, is that it is like the relationship
5 between the courts and the Legislature, the union is entitled
6 to make all the strategic and tactical calls, and it is only
7 in exceptional circumstances, extraordinary circumstances,
8 where somebody should be coming in and reviewing that, not to
9 second-guess them because the jury would make a different
10 decision, were it in that situation themselves.

11 THE COURT: I am going to go back and look at some
12 of those cases. Let me tell you what my tentative decision
13 on that is now.

14 But I, if you go to where, what is the penultimate
15 paragraph of 14, which says you must evaluate ALPA's decision
16 and legal, you must evaluate ALPA's decisions and actions,
17 only in light of the legal and factual informational
18 Pennsylvania possessed at the time it made those decisions,
19 and took those actions.

20 Therefore, any review of union actions in the
21 context of litigation must be deferential. Taking the word
22 highly out, I am not putting quotes around it. Then pick up,
23 this deferential review is designed to recognize the wide
24 latitude that negotiations need for effective performance of
25 their bargaining responsibilities.

1 And then evaluating whether, the rest of that
2 paragraph.

3 MR. FRAM: Yes, your Honor.

4 THE COURT: I am going to, that is my tentative
5 conclusion.

6 I am going to revisit the cases. If you want to,
7 tomorrow morning, give me a two-page thing on it, you can. I
8 didn't like highly deferential, I think the word highly --
9 but I think the concept that they need wide latitude, et
10 cetera, is a proper concept.

11 Okay. So let me take notes.

12 MR. FRAM: Thank you, your Honor.

13 THE COURT: Okay. What is next?

14 MR. FRAM: Still in paragraph 14 I think perhaps
15 just above that, the draft charge reads: In this case you
16 must decide whether ALPA breached its duty of fair
17 representation, and go on. We would request a charge that
18 clarifies who ALPA is and who it is not. We argued an hour
19 or so ago that the MEC was getting advice from Michael
20 Glanzer, and Stephen Tumblin and some of these other outside
21 advisors they engaged directly. We are concerned, your
22 Honor, that the jury be clear on who they are looking to in
23 terms of ALPA. So I haven't thought of --

24 THE COURT: You can argue who retained them and
25 what the roll is. I am not going to try to make a

1 distinction between, you know, that the union is the union
2 and the MEC is something totally different. Not going to do
3 that.

4 MR. FRAM: Okay, thank you.

5 THE COURT: But you can, you know, the fact that
6 you can argue that they were selected by the MEC, you know,
7 and reported to the MEC, or paid for by the union. I am not
8 going to allow it. Next. Finished with 14 out of 15.

9 MR. FRAM: Yes. 15, I think, on 15, your Honor,
10 you didn't like "highly." But I will note any way that at
11 the very top of the next page, it refers to reasonableness
12 that is irrational.

13 THE COURT: Sorry.

14 MR. FRAM: The first sentence of 15, union's
15 conduct is arbitrary if looking at all the evidence
16 presented, it is so far outside the range of reasonableness
17 that it is irrational.

18 I just note O'Neill uses the phrase "wholly
19 irrational." So we would ask the Court to consider that.

20 THE COURT: I personally think the word "wholly"
21 confuses rather than, if the plaintiff accepts it, I will put
22 it in.

23 MR. PRESS: No. I like your instruction, Judge.

24 MR. FRAM: I have nothing else on 15, your Honor.

25 THE COURT: 16.

1 MR. PRESS: The last paragraph of instruction 15
2 has a reference to not filing grievances.

3 THE COURT: Say again.

4 MR. PRESS: There is a reference to not providing
5 represented employees proper forms for grievances.

6 THE COURT: Where?

7 MR. PRESS: Last paragraph.

8 THE COURT: 16.

9 MR. PRESS: Of 15.

10 THE COURT: 15, I am sorry.

11 MR. PRESS: First sentence talking about grievance
12 forms, Judge. I didn't know what that was about.

13 THE COURT: I agree. That is far from relevant in
14 this case.

15 MR. PRESS: I would suggest putting a period after
16 the word "manner" and deleting the rest of that.

17 MR. FRAM: No objection to that, your Honor.

18 THE COURT: I don't see why anybody would want
19 that.

20 Probably move that sentence up as part of the
21 previous paragraph. In other words, put a period after
22 "manner," then move that truncated sentence as part of the
23 previous paragraph.

24 Okay. 16.

25 MR. FRAM: Your Honor, the beginning of 15, we

1 think it is important to quote from language from Lockridge
2 that we had in our proposed charge on charges 14 C, in the
3 language would be, also some language from Deboles, your
4 Honor, it would be to the effect that to establish bad faith
5 plaintiffs have the burden of presenting affirmative
6 substantial evidence of fraud, deceitful action or dishonest
7 conduct.

8 A showing of fraud, deceitful action, or dishonest
9 conduct would prove -- requires proof of all of the following
10 elements. We have the four elements on page 29 of our
11 proposed charge that come from Deboles. A misleading
12 statement or material omission in reliance, injury and
13 wrongful intent. We didn't believe that those concepts, your
14 Honor, are sufficiently --

15 THE COURT: I have your language right here.

16 MR. FRAM: Thank you.

17 THE COURT: It goes on.

18 MR. FRAM: I think it is just the one paragraph I
19 am focused on.

20 THE COURT: You have to establish bad faith, the
21 plaintiffs have the burden of burden of establishing fraud.
22 Deceitful action, dishonest conduct. Showing of fraud,
23 deceitful action, requires proof of all the following
24 elements.

25 MR. FRAM: Exactly, your Honor.

1 THE COURT: You rise.

2 MR. PRESS: It is an incomplete statement of the
3 law, is our primary objection, Judge. You have given
4 examples of what bad faith are, and their proposed
5 instruction would exclude some of those things. It is an
6 incomplete statement of what may constitute bad faith.

7 THE COURT: I mean I am sure in the context of the
8 way some duty of fair representation cases have arisen, fraud
9 is a meaningful concept. But it is not too meaningful in the
10 way this case has arisen. I know you would like to shoehorn
11 this into a fraud case. But I am not sure, if it was a true
12 fraud case for one thing the burden of proof is different.
13 In a fraud case the burden of proof is clear and convincing,
14 not by a preponderance to start with.

15 MR. FRAM: Your Honor, we researched that issue.
16 Under state law that is the case. Under federal law it is
17 not. We hoped to argue that. Under the DFR law, even fraud
18 cases like Deboles are subject to the preponderance standard.
19 I think it is clear that major aspects of this case are fraud
20 cases, just like Deboles.

21 THE COURT: In many cases they are fraud cases, in
22 the way they come down. But in a conflict of interest
23 situation, hard to shoehorn that into, I mean you put it
24 anywhere you want, the core of the plaintiff's case in this
25 case, is that they had a conflict. And because they had a

1 conflict, they breached, their actions were inconsistent with
2 the duty of fair representation.

3 That is very simple terms. Their case. That
4 doesn't fit well into the fraud paradigm. I mean.

5 MR. FRAM: Your Honor, could I be heard on that?

6 THE COURT: Yes.

7 MR. FRAM: I think there is an important
8 distinction. They point to the conflict as evidence of bad
9 faith, but they still have to prove that there was, they
10 still have to prove that there was substantial evidence of
11 fraud and deceitful action, dishonest conduct, reliance on
12 the other elements. And if they don't prove the other
13 elements, then the fact that there was a conflict becomes
14 meaningless. I think the Deboles case really punctuates that
15 point. They are separate elements, your Honor, and I think
16 to the extent they are pushing a theory that, well, the
17 breach here was having a conflict, but failing to disclose
18 it, that goes nowhere.

19 There has to be action, or inaction, or some other
20 conduct, that harms the plaintiffs. You can't have a
21 conflict that sits out in the vacuum, that does not result in
22 some action or inaction upon the plaintiffs. That is why we
23 think the language here is so essential, and again, I am
24 taking it from O'Neill and from Deboles, I would submit, your
25 Honor, this case is just like Deboles, where the plaintiffs

1 are claiming that --

2 THE COURT: Deboles?

3 MR. FRAM: Deboles, we cited Deboles v. TWA, the
4 Third Circuit cases, your Honor may recall, it was written by
5 Judge Gerry sitting by designation some years ago. I think.

6 THE COURT: It was some years ago, yes.

7 MR. FRAM: I think it was '76. If the theory here,
8 your Honor, is that the fact of the conflict goes anywhere, I
9 just don't get it.

10 We have already, your Honor mentioned this morning
11 and you are absolutely right, that it was entirely lawful and
12 not improper for Duane Woerth to go in and talk to the APA in
13 the fall of 2000. One of the things we request is that you
14 instruct the jury to that effect.

15 THE COURT: Let me ask you this. Let's assume the
16 company has a conflict. The one we have here in this case.
17 Alleged.

18 MR. FRAM: Yes, your Honor.

19 THE COURT: And the union in effect doesn't use its
20 best efforts to represent their members because of this
21 conflict. You are saying because the jury might have trouble
22 finding a misleading statement or representation the case
23 fails?

24 MR. FRAM: No. What we are saying, your Honor, is
25 two things. One, we are saying that --

1 THE COURT: You make it look like a false or
2 misleading statement is the heart of the case.

3 MR. FRAM: Your Honor.

4 THE COURT: That is not really the heart of this
5 case.

6 MR. FRAM: Your Honor, I think it is, but to the
7 extent it is part of this case, we believe it is essential to
8 have that language so that they can evaluate that part of the
9 case. We understand that --

10 THE COURT: Why don't, does, if a party has a duty,
11 or it is infected by a desire to receive a benefit from some
12 other group, so it doesn't use its best efforts, because of
13 that conflict, to represent its members, why does there have
14 to be a misrepresentation?

15 MR. FRAM: Your Honor --

16 THE COURT: What makes their need for a
17 misrepresentation, that particular context.

18 MR. FRAM: First of all, best efforts is not the
19 standard.

20 THE COURT: Well, let's they are influenced by
21 their desire to benefit APA, and they take steps because of
22 that not to -- well, I will for the moment use best efforts,
23 use their best efforts to represent. Specifically because of
24 their desire not to offend the American pilots who they hope
25 to bring into their fold.

1 Why does -- why would I focus on misrepresentation
2 as the heart of that cause of action?

3 MR. FRAM: Your Honor, if we are agreeing that
4 there is no claim of misrepresentation and material --
5 mission in the case I am fine with that.

6 THE COURT: I am saying they are not taking that
7 position. They are not taking the position there is no
8 misrepresentation. I am saying why should I make that the
9 focal point of the bad faith claim.

10 MR. FRAM: This goes back to my suggestion before
11 that you be more specific in terms of the types of claims and
12 say some of the claims that certified the plaintiffs here is
13 there were omissions and misrepresentation, and those claims
14 are subject to this standard. Other claims are based upon
15 the alleged failure of ALPA to, I don't want to agree with
16 you about best efforts, I think it is a concept that is not
17 recognized.

18 THE COURT: I agree.

19 MR. FRAM: It is highly deferential. Other claims
20 of the plaintiff.

21 THE COURT: I say here the fact a union is
22 negligent or careless doesn't give you a cause of action.
23 One thing I made very clear that is the intent, there has to
24 be intent. They have to find intent.

25 MR. FRAM: Your Honor, you can certainly instructed

1 that certain of the claims are not based upon
2 misrepresentations or omissions.

3 THE COURT: I think you are trying to parse the
4 claims in little tiny bits that is not really justified.

5 MR. FRAM: We want the jury to be guided clearly in
6 terms of the requirements of the law. I don't think Deboles
7 could be any clearer about the need for misrepresentation,
8 omissions on the conduct, reliance by the plaintiffs. These
9 are basic fraud elements, that are essential to an evaluation
10 of not only the --

11 THE COURT: I don't think the conflict claimed in
12 this case fits very well with the fraud paradigm. I don't
13 think it works.

14 MR. FRAM: The conflict claim is element number 4.
15 That is the proof they have of wrongful intent. Before you
16 get to consideration of whether there was wrongful intent,
17 whether it was meaningful, you first have to prove there was
18 dishonest conduct or some other problem. If ALPA had made
19 correct representations, had been diligent, had done
20 everything it was supposed to do.

21 THE COURT: That, by the way, to some degree, that
22 is the Achilles heel of their case. I don't know what the
23 jury is going to do, I know what I am going to do. On appeal
24 I agree with you they are going to have to prove that they
25 did something that they shouldn't have done.

1 MR. FRAM: It is something they shouldn't have
2 done.

3 THE COURT: What?

4 MR. FRAM: Fraud, deceitful action or dishonest
5 conduct. That is part of their case.

6 THE COURT: All right. I will look at Deboles.

7 MS. RODRIGUEZ: Can I be heard on this?

8 THE COURT: Of course.

9 MS. RODRIGUEZ: This is not the standard. It is
10 not a fraud case. It is --

11 THE COURT: No, I have taken that, indeed, I made
12 changes in the way I originally drafted the charge because I
13 ought at least in this case -- the fraud matrix just doesn't
14 apply.

15 MS. RODRIGUEZ: It does not apply and it is not the
16 law, and as much as I respect Judge Gerry, a 1970 case pre
17 O'Neill by the way is not instructive. And again, I ask --

18 THE COURT: You better respect Judge Gerry.

19 MS. RODRIGUEZ: When I clerked for Judge Cohen,
20 going back, he was sick for a long period of my clerkship so
21 I actually ended up getting switched over to Judge Gerry for
22 that time.

23 THE COURT: I sit in Judge Gerry's old chambers.

24 MS. RODRIGUEZ: I know you do. In Aguinaga, the
25 Court addresses these issues. It says if --

1 THE COURT: In what?

2 MS. RODRIGUEZ: Aguinaga.

3 THE COURT: Spell that.

4 MS. RODRIGUEZ: A G U I N A G A. It is a Second
5 circuit Court of Appeals, 1993.

6 The Court says, if, as the union argues, O'Neill
7 counsels that the union be accorded due deference in its
8 decision to sacrifice plaintiffs' rights, such deference
9 would only be appropriate insofar as the union's motives have
10 been proper, i.e., to gain advantage with Morrell embarking
11 over other plants. Here, however, plaintiffs presented
12 evidence that the union had other motives in sacrificing
13 plaintiffs' rights and concealing its activities. The record
14 contains evidence that tended to show that the union was
15 motivated in part by its desire to obtain status as the
16 bargaining representative for three reopened plants. As
17 neither of these motives are proper for a union which had the
18 duty to its members akin to the duty owed by other
19 fiduciaries to their beneficiaries, we hold that there is
20 evidence upon which the jury could probably find that the
21 union breached its duty of fair representation.

22 There is no talk about a four-part test and parsing
23 here and parsing there. It is one duty of fair
24 representation.

25 THE COURT: I told you I already made changes in

1 this. I actually had some fraud stuff in an earlier draft of
2 this. See draft number 2. Draft number 1 actually had some
3 fraud language in it which I took out. And I took it out
4 because I didn't believe that this case, you know, fit well
5 within that paradigm, within that framework. I will reread
6 these cases.

7 MR. KATZ: Your Honor, we cited in many of the
8 briefs that have been filed a number of cases that followed
9 Deboles, that reaffirmed the principles that were laid out in
10 Deboles, and a few of them that are after, Anderson, Acri,
11 Cell in the Fourth Circuit. These are six or seven different
12 circuit courts of appeal that make clear that Deboles is good
13 law throughout the country. Aguinaga is a very unusual and
14 atypical case --

15 MS. RODRIGUEZ: These are the two cases I cited.

16 MR. KATZ: The point I wanted to make is that there
17 are allegations in this case of misstatements that the
18 plaintiffs are relying upon. And while no one approves or
19 condones the idea of union representatives making
20 misstatements, there are a wide variety of cases that deal
21 with the issue in a duty of fair representation context,
22 including cases where a union representative basically is
23 accused of taking a dive, as the accusations are here, in
24 order to persuade employees to ratify a collective bargaining
25 agreement.

1 And in those cases, the fact that there is a
2 misstatement is far from enough to establish a duty of fair
3 representation violation. And even a bad motive of making a
4 misrepresentation in order to make a deal when it is not in
5 the best interest of the employees is not enough.

6 As Mr. Fram has been pointing out, the cases in all
7 these courts of appeals that I have mentioned that are cited
8 in our motion to decertify the class, in our 1292 (b)
9 application, and even in our summary judgment motion, those
10 cases show that it is vital in order to prove a DFR
11 violation, that --

12 THE COURT: I am going to revisit the issue. I
13 told you.

14 MR. KATZ: All right. I would just suggest that
15 you look at the other briefs that collect some of the cases
16 in other circuits.

17 THE COURT: I am not going to make a change now.
18 But I have your point. I will read it.

19 MR. KATZ: Thank you.

20 MR. PRESS: It dawned on me listening to Mr. Katz
21 the best guidance we have in this case is the Third Circuit's
22 decision in this case. They held that if we prove that the
23 union failed to do anything for an improper purpose, we win,
24 or we can win.

25 MR. FRAM: Your Honor, I have --

1 MR. PRESS: That is black and white. That was the
2 holding.

3 MR. FRAM: Failed to do anything. But what about
4 causation? What about injury in fact? What about Deboles,
5 your Honor, that says that there can be no liability in the
6 absence of injury, because, quote, "any remedy against the
7 union would necessarily be a 'punishment' for a harmless
8 lie."

9 Deboles, as you recall is a case where the District
10 Court found there were affirmative misrepresentations. The
11 Third Circuit reverses. A harmless lie. A lie that wasn't
12 relied upon by the union members, and that didn't result in
13 any harm, is meaningless, there is no DFR violation.

14 THE COURT: I have accepted that principle.

15 MR. FRAM: Thank you.

16 THE COURT: There has to be harm from the wrongful
17 conduct. We have a verdict sheet and we have it in the
18 charge.

19 All right. I will revisit that. We will look at
20 that again. I am not changing paragraphs 16 now.

21 Okay. What about, anything for the rest of it?

22 MR. FRAM: Your Honor, 16, I am looking at the
23 third line.

24 THE COURT: Third line of the first paragraph.

25 MR. FRAM: A phrase, "out of a desire to obtain an

1 undeserved benefit at the expense of the employees it
2 represents, A. We are not certain that there is any law that
3 supports that; B. It doesn't seem to have any application to
4 the case, your Honor. We are concerned it will be confusing.

5 MS. RODRIGUEZ: Where are you?

6 THE COURT: The very first sentence of paragraph
7 16.

8 MR. FRAM: We ask the Court to strike that.

9 (Pause)

10 MR. PRESS: We don't have a problem removing that
11 sentence or clause.

12 THE COURT: He wants the whole sentence removed.

13 MR. PRESS: I forgot where we are.

14 THE COURT: First paragraph, first sentence, first
15 paragraph of 16.

16 MS. RODRIGUEZ: We don't have a problem with it.

17 MR. PRESS: No, not the whole sentence, just the
18 last --

19 THE COURT: I don't know. What is it you asked to
20 be struck?

21 MR. FRAM: Your Honor, we would strike "or out of a
22 desire to obtain an undeserved benefit at the expense of."

23 THE COURT: Do you have an objection to that?

24 MR. PRESS: No.

25 THE COURT: It reads "A union's conduct is made in

1 bad faith when it acts or fails to act out of ill will
2 towards the employees it represents."

3 MR. FRAM: Yes.

4 THE COURT: There is no objection to that change.
5 I will make it.

6 THE COURT: What else?

7 MR. FRAM: Next paragraph, examples of bad faith.
8 Deliberately making misleading statements to employees, not
9 disclosing conflicts of interest, acting with hostility
10 towards union members and ignoring union policies in labor
11 negotiation. We are a little concerned about that language,
12 your Honor.

13 One, not disclosing conflicts of interest. I am
14 not sure, we don't believe the law supports that. Acting
15 with hostility towards union members.

16 Again, I alluded to this testimony, which I think
17 you know my view of it, by Comlish, that when Duane Woerth
18 scowled at him, I am concerned that the jury might think
19 someone might not, that someone allegedly raising their
20 voice, that someone raising their voice is a violation. It
21 doesn't. It has to be meaningful. Or ignoring the policy of
22 the labor negotiation. I don't know that the law supports
23 that.

24 We think the jury is going to be confused, and I
25 don't believe there is any evidence, your Honor, in the case

1 that we ignored, that ALPA ignored union policy. What I
2 would ask your Honor to do is strike that sentence and --

3 THE COURT: That paragraph.

4 MR. FRAM: That paragraph.

5 THE COURT: It is one sentence.

6 MR. FRAM: The one sentence paragraph which I know
7 your Honor disfavors, you said that before. We have a one-
8 sentence paragraph and no page numbers.

9 THE COURT: Bad news.

10 MR. FRAM: That is my reference and let the jury
11 rely upon the more general discussion of the standard.

12 Of course, our concern is by giving specific
13 examples that arguably dovetail with the plaintiff's
14 arguments, that this becomes suggestive to the jury and
15 prejudicial to the defendant.

16 THE COURT: I will wait to see.

17 MR. PRESS: I don't have the cases in my
18 fingertips. I know there is legal support for every
19 submission you included in here. I think this is completely
20 proper.

21 THE COURT: I am going to omit "ignoring union
22 policies and labor negotiations." Because I don't think
23 there is anything in this case --

24 MR. PRESS: There is.

25 THE COURT: Well, tell me what there is.

1 MR. PRESS: ALPA merger policy in an ALPA to non-
2 ALPA case requires the president to take reasonable steps to
3 insure that a fair process is entered into for a fair and
4 equitable integration. There is no evidence Duane Woerth did
5 anything to comply with that policy. All the evidence and
6 inferences would suggest that he didn't do anything. That is
7 policy one.

8 Policy two, we got it yesterday from Seth Rosen,
9 the collective bargaining policy, the concessionary
10 negotiation requires that those negotiations be coordinated
11 through the president's office. Again, there is no evidence
12 that Duane Woerth did anything. And so that is two big ones
13 right there, Judge.

14 MR. FRAM: Duane Woerth signed the transition
15 agreement. Your Honor pointed that out. It was negotiated
16 by the negotiating committee, approved by the entire MEC,
17 signed off on by Ron Kiel, negotiated --

18 THE COURT: You are talking about the transition
19 agreement.

20 MR. FRAM: Yes. That is what I think Mr. Press is
21 alluding to. I don't know how he can argue it wasn't
22 coordinated through the president's office. That is not a
23 violation. I think Mr. Rosen said as well that we are
24 dealing with guidelines, not policies. How is that harmful
25 to anybody? So yes --

1 THE COURT: I am sorry. If you don't do it.

2 MR. FRAM: Well, the fact of the matter, your
3 Honor, is that if there is a DFR violation in connection with
4 the transition agreement, it is during the period leading up
5 to the execution. It is unable to -- your Honor, if I can
6 make a note about the examples you had, you referred to
7 deliberately making misleading statements to employees. I
8 think this goes back to the defendant really underscores the
9 importance of the Deboles language that we talked about
10 before.

11 So we ask your Honor to consider that in
12 conjunction with that paragraph as well.

13 THE COURT: I am going to leave it as it is, but
14 subject to my reviewing Deboles, and Aguinaga, and other
15 cases. Find out whether Aguinaga was a support, and whether
16 it is a stand-alone case, we will see.

17 MR. FRAM: On the not disclosing conflicts issue --

18 THE COURT: Where are you?

19 MR. FRAM: Same sentence, that one-sentence
20 paragraph. Did I request before the instruction that it was
21 not improper in any way for Duane Woerth to go and talk to
22 the APA in late 2000? If I didn't, I would request that the
23 Court instruct the jury to that effect.

24 THE COURT: It is not improper.

25 MR. FRAM: It was not improper for ALPA as an

1 organization to adopt a unity resolution, or for Duane Woerth
2 in the wake of that to talk to APA --

3 THE COURT: Nobody testified in this case that
4 passing the unity resolution was a wrong or bad thing.

5 Nobody suggested that.

6 MR. FRAM: I think the jury is going to be confused
7 about that issue, your Honor. Our request would be to
8 clarify it by instructing the jury that until the TWA pilots
9 and the American pilots became adverse, there was nothing
10 improper that the unity resolution or Duane Woerth's going
11 and speaking to the board of the APA about it.

12 MR. PRESS: It is completely unnecessary, Judge. I
13 don't know why we would have another instruction on things
14 that are legal. Where are he going to stop?

15 MS. RODRIGUEZ: That is not an issue in the case.
16 There is nothing contested about it.

17 THE COURT: Well, I look at that differently. I
18 think he could shoot himself in the foot with that.
19 Remember, there was, he went to the APA, I think in November,
20 2000. But he went to the APA during a period they were
21 negotiating. Indeed, it is very conflicting testimony about
22 what was said. And the thing that says there is nothing
23 wrong prior to the acquisition by American and the TWA --
24 there is nothing wrong with the unity resolution or anyone
25 speaking to ALPA.

1 MR. PRESS: I see the distinction you are drawing.

2 THE COURT: Do you really want that?

3 MR. FRAM: Can I think about it over night?

4 THE COURT: Yes, think about it or, and tell me
5 Monday. I won't be here tomorrow. It seems to me you are
6 focusing with almost laser-like intensity a light on his
7 meeting about which there is some confusion, but he certainly
8 went to a meeting.

9 Now, his take on it, he went to the meeting to
10 encourage the pilots to be fair in their integration. That
11 is his recount of it. But you have a charge that any
12 visiting APA prior to January 9, whatever the date of the
13 announcement is, of the TWA acquisition, really, what does
14 that tell the jury? Forget that one. He went, why don't you
15 think about it.

16 MR. FRAM: Thank you.

17 MR. KATZ: Your Honor, may I make one comment about
18 this paragraph?

19 THE COURT: YES.

20 MR. KATZ: The union policies issue, Mr. Press
21 talked about the allegations in the case. My comment goes to
22 whether it is an example of bad faith for a union to not
23 follow one of the policies that it has. And the ALPA
24 administrative manual, like many union policies, is several
25 inches tall, and I respectfully submit, your Honor, that it

1 not automatically a breach of the duty of fair representation
2 violation, for a union to violate one of its policies. The
3 standard of the duty of fair representation is something else
4 entirely. And so, if it was automatically an example of bad
5 faith to violate a union policy, union members would be in
6 the federal courts all the time about a variety of things
7 that aren't truly justiciable -- That is even harder than
8 Aguinaga -- justiciable under the duty of fair
9 representation.

10 That was the point I wanted to make.

11 THE COURT: You make a point that I find
12 interesting.

13 MR. KATZ: Yes, sir.

14 THE COURT: Examples of bad faith include things
15 like deliberately making misleading statements to employees,
16 not disclosing records -- ignoring union policies if such
17 actions are the result of a bad faith motive as described
18 above.

19 MR. KATZ: If they result in harm --

20 THE COURT: No. No. No. Harm we will cover
21 later. In other words, I take your point. Not following a
22 particular policy for negotiation, or unions may have books,
23 you know, 100 pages long. Absolutely. It has to be
24 motivated or be the result of a bad faith motive, as I just
25 described in the previous paragraph.

1 MR. KATZ: Thank you, your Honor. I am sure you
2 know --

3 MR. PRESS: No. No problem with that.

4 THE COURT: I have to add that to be fair.

5 MR. KATZ: I am sure you know in a union meeting
6 there is frequently rough and tumble.

7 THE COURT: Rough and tumble?

8 MR. KATZ: Loud noises, scowls.

9 MS. RODRIGUEZ: On, not these guys.

10 MR. KATZ: Every time someone raised their voice in
11 a union meeting they could go to federal court we would have
12 a docket problem.

13 THE COURT: Don't worry about our docket problem.
14 I am not worried about it. Anything more?

15 MR. FRAM: My last request with respect to the
16 section 16, and I think your Honor made clear before how you
17 will rule on this is we did request an instruction about the
18 responsibilities of lawyers in recommending or pursuing
19 litigation. Those were our proposed charge 17. We had an
20 alternative charge.

21 THE COURT: Why. Paragraph 17?

22 MR. FRAM: No, it would be part of 16. We had a
23 proposed charge of 17, page 39 through 42 of the joint --

24 THE COURT: I think I have it. You are charged
25 with an excellent closing argument.

1 MR. FRAM: Your Honor, we thought that some law
2 would assist the eleven non-lawyers on the jury.

3 THE COURT: Assertion of legal claims in
4 litigation.

5 MR. FRAM: Yes, your Honor.

6 THE COURT: I have it.

7 MR. FRAM: Obviously, law is helpful in helping
8 them understand what was appropriate or not.

9 We had an alternative, your Honor.

10 THE COURT: These are four pages long. I reject
11 that totally.

12 What is the alternative.

13 MR. FRAM: Judge, just the one alternative, the
14 first was to instruct the jury that they should disregard any
15 claim based upon the litigation tactics. The alternative
16 behind it, which I think you are also rejecting, is to give
17 them some guidance about the professional and other
18 responsibilities.

19 THE COURT: No, I am not doing either of those.

20 MR. FRAM: The only other issue I think I have is
21 we did raise in our trial brief a request that the Court
22 instruct the jury with respect to the Bond bill, and I think
23 you talked about it this morning, your Honor did rule in
24 chambers on June 2 that the plaintiffs couldn't claim a DFR
25 violation based upon the failure of Congress to enact the

1 Bond bill. We think it is important that it be somehow be
2 put into the charge, and they be instructed consistent with
3 your Honor's ruling --

4 THE COURT: I understand.

5 MS. RODRIGUEZ: Your Honor, we were abiding by your
6 Honor's ruling on the 2nd. There is nothing in evidence to
7 suggest that we are maintaining, that it was a union's
8 responsibility to see that the Bond bill got passed. The
9 evidence is what the evidence is, and to give it --

10 THE COURT: I admit, you did not try to make an
11 argument in the course of presenting your case or in the
12 course of cross examination the witnesses that somehow or
13 other the failure of the Bond bill to pass was proof of
14 breach of the duty of fair representation. But I think their
15 point is, you have a fair amount of testimony about the Bond
16 bill, and we certainly, the jury knows, that it is in the
17 jury knows it didn't pass. And the jury knows that the
18 position of the plaintiffs is that, you know, the ALPA didn't
19 jump in with both feet to support that.

20 What I had ruled is that the failure to pass is not
21 proof of anything. But that the attitude toward it, how one
22 responds to it, might be evidential.

23 He is asking for a charge to tell the jury that the
24 failure to pass, that they can't conclude that the Bond bill
25 failed to pass that, that they can consider efforts made by

1 ALPA with respect to the Bond bill, but that the failure,
2 they cannot consider it as a failure, failure, its -- they
3 can consider efforts or lack of efforts, but not its failure
4 to pass.

5 MS. RODRIGUEZ: I think it gives unnecessary weight
6 to the whole --

7 MR. PRESS: What you are proposing might be an
8 acceptable instruction. But I don't know what we are
9 debating.

10 THE COURT: I am going to try to, I accept the
11 point that counsel is making. I certainly don't want the
12 jury to think that because of, because it didn't pass, that
13 it proves that somebody didn't lobby strongly enough. As
14 their own expert said, somebody, maybe it is the MEC's expert
15 that said it, anybody who tried to predict whether a bill
16 will be passed by Congress, somebody should consult the Tooth
17 Fairy. Pretty much that is what it said. You know what I am
18 talking about?

19 MS. RODRIGUEZ: I think it is in the --

20 MR. KATZ: Mr. Estes' letter, Estes and Associates.

21 THE COURT: His last paragraph, are you kidding me,
22 nobody can tell what Congress is going to do.

23 THE COURT: I am going to consider a subparagraph
24 on the Bond bill. You can both look at it.

25 MR. FRAM: Thank you, your Honor.

1 THE COURT: Let's go to -- is there anything on the
2 rest of it?

3 MR. FRAM: I didn't see anything.

4 THE COURT: The rest of it is boilerplate. If the
5 word boilerplate has any meaning. This is it.

6 MR. FRAM: Looks fine. I didn't see any one-
7 sentence paragraphs either.

8 THE COURT: I only made that mistake once. Mr.
9 Katz is weighing in.

10 MR. FRAM: I will let him speaking for himself.

11 MR. KATZ: At the bottom of the page.

12 THE COURT: What page?

13 MR. KATZ: Page 17.

14 THE COURT: Paragraph 17.

15 MR. KATZ: Section 16 on page 17. It ends saying
16 if you find looking at all the evidence presented and that
17 ALPA acted in bad faith, you must find it breached its duty
18 of fair representation. It seems to me that --

19 THE COURT: You want the reverse. You want the
20 converse of that?

21 MR. FRAM: We do.

22 MR. KATZ: We want that, but I think it would be
23 appropriate to circle back to the causation element which is,
24 which you said earlier is a requirement to establish a DFR
25 violation. Without that it may lead someone to conclude that

1 it doesn't apply in this situation.

2 MR. PRESS: Your Honor, your verdict form is very
3 clear in that distinction.

4 THE COURT: Nobody has objected to the verdict
5 form.

6 MR. PRESS: I have a problem with it.

7 THE COURT: What.

8 MR. PRESS: I have a slight problem. One word
9 problem.

10 THE COURT: I will listen to you.

11 MR. PRESS: I don't think we need to load up 16
12 with that when you made the distinction clear in the verdict
13 sheet. I don't think it is necessary.

14 THE COURT: I may add it. I may not. I will look
15 at that. If I add it, I will tell you and you can object.

16 What about 17? To the end.

17 MR. FRAM: 17 to the end is fine.

18 MR. PRESS: We have no problem.

19 THE COURT: Okay. I will prepare a new version of
20 this. And it will be called draft three. And I will
21 probably get it to you Monday morning. You will have it
22 before you close.

23 MR. FRAM: Thank you, your Honor.

24 THE COURT: Yes.

25 MR. FRAM: Will your Honor entertain comments on

1 the verdict sheet?

2 THE COURT: Yes.

3 MR. FRAM: I have one request. I think I know how
4 you are going to rule. We submitted a verdict sheet.

5 THE COURT: Let me find it.

6 MR. FRAM: Your Honor, we think it is important to
7 separate issues out to avoid confusion. We request separate
8 questions relating to the vote on April 2 and events
9 thereafter, both with respect to each breach of the duty and
10 causation.

11 THE COURT: No. No. I don't think, I know you
12 wanted from day one to separate the case that way. If you
13 want to argue that there was no card campaign, the evidence
14 doesn't show there was any conflict up April 2. Fine, you
15 can argue that to the jury. But I am not going to split the
16 case.

17 MR. FRAM: Thank you, your Honor.

18 THE COURT: What is your comment?

19 MR. PRESS: Interrogatory two, the causation
20 question. Did ALPA's violation of its DFR directly cause
21 injury to the TWA pilots?

22 I would suggest removing the word "the" and leaving
23 it, because that would suggest all. And the jury has heard
24 from Mike Day that he wasn't hurt by Supplement CC. And that
25 fact alone would preclude us from a yes answer to that

1 question.

2 MR. FRAM: I am thinking, your Honor.

3 THE COURT: He wants the word "some of the."

4 MR. PRESS: That would be fine.

5 MR. FRAM: This goes back to the concerns we had
6 about certification of the class, your Honor. Can I think
7 about that overnight as well?

8 THE COURT: Sure.

9 MR. FRAM: I am not sure.

10 THE COURT: Absolutely.

11 MR. FRAM: I think our position is they do have to
12 show injury to the entire class.

13 THE COURT: Every member of the class?

14 MR. FRAM: Yeah, I think so. Let me think about
15 it, your Honor.

16 THE COURT: Okay,

17 MR. FRAM: Let me note as well if I could, if we
18 are going to water this down to the extent that they only
19 have to show injury to Sean Clarke or a handful of pilots, I
20 am not sure that we have accomplished very much if we have to
21 proceed with the damages phase. But I do want to think about
22 that.

23 I can address that, if it is okay, on Monday
24 morning.

25 THE COURT: Okay.

1 MR. PRESS: In closing, and I know you are going to
2 do more work on this. On the verdict directing instructions,
3 Judge, I don't think it is appropriate to load them up with
4 too much more language.

5 THE COURT: Who is loading up language?

6 MR. PRESS: I know you are going to go back and
7 visit 14, 15 and 16. We can't have a treatise for the jury
8 on the law of DFR.

9 THE COURT: You are talking about the verdict
10 sheet.

11 MR. PRESS: The verdict directing instructions.

12 THE COURT: Paragraphs 13, 14 and 15, 16.

13 MR. PRESS: The law on how to instructed in this
14 kind of case is probably unsettled, if nonexistent.

15 THE COURT: I don't think, did either have you ever
16 find canned instructions in this case of case.

17 MR. PRESS: No.

18 MR. FRAM: We found instructions in what they call
19 a hybrid case, some out of the Ninth Circuit, a couple
20 circuits had them on DFR cases. There was a hybrid type
21 case.

22 THE COURT: What do you mean by that?

23 MR. FRAM: The union is accused of not pursuing a
24 grievance with the employer. The union member ends up suing
25 both the employer and the union. And they are more

1 complicated than this. But there are some out there. I
2 don't think there are any in the Third Circuit.

3 THE COURT: I think failure to pursue a grievance,
4 I am not saying it is not a DFR case. It is really totally
5 different.

6 MR. PRESS: The point I was going to make, Judge,
7 is if you are instructions are to be a fair statement of the
8 law so the jury can return a fair verdict. And I think you
9 have done that. And I know you are going to revisit these
10 things. I wanted to --

11 THE COURT: A lot of the ones you asked, you agree
12 to. But I think in fairness, we ought to look at Deboles,
13 and, if I pronounce that directly. Aguinaga.

14 MS. RODRIGUEZ: Now you see why I had to look at it
15 before I could say it.

16 THE COURT: No, I understand. All right. I won't
17 be here tomorrow. But we will have this done for you Monday.
18 Monday, the order of March is you are going to call in
19 rebuttal Sherry Cooper.

20 MS. RODRIGUEZ: Yes.

21 THE COURT: And then closings start.

22 MR. PRESS: Your Honor, will you be leaving the
23 bench Monday at 2:00 or thereabouts?

24 THE COURT: 2:30. I mean it is no secret, I get
25 dialysis three times a week and I start about 3:30 I am on

1 the machine for four hours. Dialysis is Monday, Wednesday
2 and Friday. Although my early start, my eight o'clock start
3 I was doing long before dialysis. I have always done that.
4 I get a full day in, but I can't sit in the afternoon.
5 Sorry. That is all I can do.

6 MR. PRESS: Thank you.

7 MR. FRAM: Thank you.

8 THE COURT: Thank you very much.

9 (Adjourned)

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